TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1902.

No. [illegible] 202, 43.

GEORGE C. THOMAS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 18, 1902.

(18,503.)

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SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 19, 1902.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The United States, plaintiff, and George C. Thomas, defendant, a manifest error hath happened, to the great damage of the said defendant George C. Thomas, as is said and appears by his complaint: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 23rd day of April, 1902, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of March, in the year of our Lord one thousand nine hundred and two.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ in hereby allowed & proceedings for enforcing the judgment are stayed pending the hearing on the writ.

EDWARD B. THOMAS, *U. S. J.*

M'ch 25th, 1902.

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from four to 57 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of George C. Thomas, plaintiff in error, *vs.* The United States, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern dis-

trict of New York, in the second circuit, this first day of April, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-sixth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 [Endorsed:] E. & A. B. 1923. Supreme Court of the United States. George C. Thomas, plaintiff in error, *vs.* United States, defendant in error. Writ of error. Pavey & Moore, attorneys for plaintiff in error, 32 Nassau street, borough of Manhattan, New York city. U. S. circuit court, southern district New York. Filed Mar. 25 1902. John A. Shields, clerk. Due and timely service of a copy of the within writ of error is hereby admitted. Dated March 25, 1902. Henry L. Burnett, attorney for Uited States. 10 pd.

4 Supreme Court of the United States.

UNITED STATES *vs.* GEORGE C. THOMAS. } Petition for Writ of Error.

To the honorable the judges of the Supreme Court of the United States of America:

Comes now the above-named defendant by Pavey and Moore, his attorneys, and complains that in the rendition of the judgment against the said defendant in the above-entitled cause in the circuit court of the United States for the southern district of New York on the twelfth day of March, 1902, and in the record and proceedings had prior thereunto in this said cause, manifest error hath happened to the great damage of said defendant, all of which will more in detail appear from the assignment of errors which is filed herewith.

Wherefore, the defendant prays that a writ of error may be issued by the Supreme Court of the United States of America to the circuit court of the United States for the southern district of New York for the correction of the said certain errors so complained of, and also that a citation in due form may be issued, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States of America.

PAVEY AND MOORE,
Attorneys for Defendant and Plaintiff in Error,
32 Nassau Street, Borough of Manhattan,
New York, N. Y.

Dated, March 24th, 1902.

The foregoing petition is hereby allowed.
EDWARD B. THOMAS, *U. S. J.*

5 (Endorsed:) Supreme Court of the United States.—United States *vs.* George C. Thomas.—Petition for writ of error.—

Pavey & Moore, attorneys for George C. Thomas.—Due and timely service of a copy of the within petition is hereby admitted.—Dated March 25th, 1902, Henry L. Burnett, attorney for United States.—U. S. circuit court, southern district of New York, Filed Mar. 25, 1902, John A. Shields, clerk.

6 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the second Wednesday of October, in the year of our Lord one thousand nine hundred and one, and continued by adjournment to and including the tenth day of December, in the year of our Lord one thousand nine hundred and one.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid, on their oath present that George C. Thomas, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore to wit, on the fifteenth day of May in the year of our Lord one thousand nine hundred and one, at the southern district of New York, and within the jurisdiction of this court, being a broker doing business in the said city and county, then and there sold to one T. D. Scoble, one hundred shares of Atchison preferred stock, for the sum of nine thousand two hundred and sixty-two dollars and fifty cents, but a further or more particular description of the said shares of stock is to the jurors unknown and cannot be given in this indictment. And at the time of said sale, the said George C. Thomas made and de-
7 livered a memorandum of said sale to the said T. D. Scoble, of the tenor following, to wit:

"Stamps. NEW YORK, *May* 15, 1901.

Sold to T. D. Scoble, by Geo. C. Thomas,

100 shares of Atchison preferred at 92⅜.....$9,262.50"

and it was then and there the duty of the said George C. Thomas, the seller aforesaid, and he was required by law, then and there, to affix to and upon the said memorandum of sale, the proper revenue stamps to denote the amount of tax due to the Government of the United States at the time of said sale and the delivery of said memorandum as aforesaid and the said George C. Thomas then and there was liable to pay the tax aforesaid. And the said George C. Thomas, at the time of making the sale aforesaid and the delivery of the memorandum thereof, as aforesaid, did unlawfully and willfully make and deliver said memorandum of the said sale to the said buyer, namely, the said T. D. Scoble, without then and there having the proper stamps

affixed thereto, to denote the tax aforesaid, with intent to evade the provisions of section 25, Schedule A, (entitled "stamp taxes"), of the "Act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, in the respects hereinbefore set forth and described; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

HENRY L. BURNETT,
U. S. Attorney.

(Endorsed:) U. S. circuit court.—The United States of
8 America *vs.* George C. Thomas.—Indictment. Failure to affix revenue stamps to memorandum of sale.—Act of June 13, 1898.—Henry L. Burnett, U. S. district attorney.—A true bill, Lawrence F. Abbott, foreman.—U. S. circuit court, southern district of New York, Filed Dec. 10, 1901, John A. Shields, clerk.—Filed in open court the 10th day of December, 1901.—Dec. 11, 1901, the defendant arraigned and indct. read. Def't interposes demurrer.—1901, Dec. 24, demurrer argued, overruled, def't to plead over.—1902, Mar. 12, def't rearraigned, pleads not guilty.—March 12, 1902, the defendant tried. Verdict guilty.—Motion in arrest of judgment granted, 30 days' stay. 1902, March 12, sentence, five hundred dollars fine, to stand committed, etc. Held in $1,000 bail.

9 Circuit Court of the United States for the Southern District of New York.

UNITED STATES
vs.
GEORGE C. THOMAS. } Demurrer.

The defendant, George C. Thomas, demurs to the indictment presented by the grand jury on the 10th day of December, 1901, charging him with the crime of violating the internal-revenue laws of the United States, upon the ground that the facts alleged in said indictment do not constitute an infringement of, or a crime against the laws of the United States for the reason that the portions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898, and known as the war revenue law of 1898, upon which the said indictment is based, are unconstitutional and void because they are in violation of the Constitution of the United States, and, more particularly, in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

10 Wherefore, this defendant asks judgment that he be dismissed and discharged from the said premises specified in the said indictment.

FRANK D. PAVEY,
Of Counsel for Defendant.

PAVEY & MOORE,
Attorneys for Defendant.

Office and post-office address, 32 Nassau street, Manhattan, New York, N. Y.

(Endorsed:) Circuit court of the United States, for the southern district of New York.—United States of America *vs.* George C. Thomas.—Demurrer.—Pavey & Moore, attorneys for defendant, 32 Nassau street, New York city.—Filed in court, Dec. 11, 1901.—H. I. T. dep. cl'k.

11 TUESDAY, *December 24th*, 1901.

The court meets and is opened by proclamation.
The Honorable Edward B. Thomas, judge.

THE UNITED STATES
vs.
GEORGE C. THOMAS. } C. 2695.

The argument of a demurrer interposed to the indictment in the above cause coming on this day to be heard:
Mr. Frank D. Pavey is heard in support of demurrer, Mr. William S. Ball, assistant to U. S. attorney, opposed.
C. A. V.

12 Circuit Court of the United States for the Southern District of New York.

THE UNITED STATES
vs.
GEORGE C. THOMAS. } Jan'y 28, 1902.

Henry L. Burnett, United States attorney, and William S. Ball, assistant attorney.
Pavey & Moore, attorneys for defendant, Frank D. Pavey, of counsel.

THOMAS, *J.*:

The defendant demurs to an indictment, which charges that he, being a broker in the city of New York, sold certain shares of Atchison preferred stock, and omitted the required revenue stamps from the memorandum of sale, with intent to evade the war revenue act of 1898. The act provides:

"*Adhesive Stamps.*

SECTION 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid,

for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment or paper upon which such instrument-, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

* * * * * * *

"SCHEDULE A.

Stamp Taxes.

Bonds, debentures, or certificates of indebtedness issued after the first day of July, anno Domini eighteen hundred and ninety-eight, by any association, company, or corporation, on each hundred
13 dollars of face value or fraction thereof, five cents, and on each original issue, whether on organization or reorganization, of certificates of stock by any such association, company, or corporation, on each hundred dollars of face value or fraction thereof, five cents, and on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company or corporation, whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money, or for the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents: Provided, that in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. And any person or persons liable to pay the tax as herein provided, or any one who acts in the matter as agent or broker for such person or persons, who shall make any such sale, or who shall in pursuance of any such sale deliver any such stock, or evidence of the sale of any such stock or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions shall be deemed guilty of a misdemeanor."

The defendant urges that the statute, so far as here involved, is unconstitutional. He premises that a certificate of stock is property;

that a tax on the sale of property is a tax on the property itself; and from this he concludes that the act provides for levying, without apportionment, a direct, and hence invalid, tax on such property.

The statute lays a stamp duty, (1) on the bonds, debentures, or certificates of indebtedness issued by any association, company, or corporation, (2) on original certificates of stock issued by any such body, (3) on all subsequent sales, or agreements to sell, or
14 memoranda of sales or deliveries or transfers of such certificates.

The present inquiry relates to a tax on a memorandum or contract of sale of a certificate of stock. What is such certificate? It is the evidence of the holder's title to shares in the property and franchises of a corporation. The sale of the certificate is a transfer of such shares to another person. The State furnishes facilities, whereby persons may form a corporation, which may designate the individual interests of its members by certificates, transferable upon its books, so as to permit the holders to manage or direct the business of the corporation, with such liability, privileges, and immunity as the charter and the law provide. Congress has declared that every person, who holds such a certificate in such artificial body, and shall transfer by sale to another the right to participate in such corporation, and to become a member thereof, with the accompanying property rights and benefits, shall pay a tax on the contract or transaction, whereby the transmission is effected. It is not intended at this time to emphasize the benefits and protection afforded by the law to the members of such bodies, and the enhanced value of their property rights by reason of the facilities afforded them. In a matter of less importance such privilege would deserve at least consideration, but the present discussion will pursue broader views and inquiries.

The defendant relies upon certain decisions of the Supreme Court, and judicial expressions in the opinions, to wit: That Congress may not levy a stamp tax on bills of lading of goods exported, Fairbanks *v.* United States, 181 U. S. 283; nor levy a license tax upon an im porter, Brown *v.* Maryland, 12 Wheat. 419; nor tax sales by auc-
15 tioneers of imported goods in the original packages, Cook *v.* Pennsylvania, 97 U. S. 566; nor lay a license tax upon goods not the product of the State but brought therein for sale, Welton *v.* Missouri, 91 U. S. 279; nor tax a bill of lading for metal shipped from a point within to a point without, the State, Almy *v.* California, 24 How. 169, 174; nor lay a license tax on drummers selling or offering for sale goods by sample and having no licensed house of business in the taxing district, Robbins *v.* Shelby County Taxing District, 120 U. S. 489.

These cases involve attempts on the part of the United States to tax exports, or of States to tax imports or exports, or to lay taxes on subjects of interstate commerce. They contain statements or holdings, that a tax on the occupation of importer or exporter is a tax on the goods imported or exported; that a tax on a bill of lading of export goods is a tax on the goods;

that a tax on a vendor of foreign goods is a tax on what he sells; that a tax upon sales of imported goods in the original packages, payment whereof is obligatory upon the auctioneer, is a tax on the goods, and, that a tax on the sale of an article, imported only for sale, is a tax on the article itself, Brown *v.* Maryland, 12 Wheat. 444. It will be observed, that in each instance the subject-matter of the tax was not within the taxing power. Hence, no tax, direct or indirect, could be laid thereon, under any disguise whatsoever. The taxation of property, other than exports, is within the power of Congress, although the tax must be raised in the manner pointed out by the Constitution, that is, "direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity." The defendant quotes with some special urgency from the opinion in Nicol *v.* Ames, 173 U. S. 519, where the following portion of the war-
16 revenue act of 1898 is construed:

"Upon each sale, agreement of sale or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent."

It was held that the tax was laid upon the facilities of the exchange and was valid. Mr. Justice Peckham in the course of the opinion said:

"A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

The defendant infers from this excerpt that a tax upon sales of property is a direct tax, and invalid unless apportioned. The defendant's argument, so far as based on the decisions, other than the last cited, may be tested. It is that, inasmuch as the tax on an importer, bill of lading of export goods, sales by auctioneers of imported goods for the importer, vendors of goods from beyond the taxing State, is a tax upon the goods themselves, and invalid, so a tax on transfers of property is a direct tax upon the property itself. The fallacy of this method of argument quickly appears. Thus, a license tax on the importer of tobacco is a tax on the goods imported; hence, a tax on a dealer in domestic tobacco is a direct tax on his commodity. A license tax by a State upon foreign salesmen is a tax on the subjects of their sales; hence, a Federal tax on the occupation of a salesman, in the State where he resides, is a direct tax on the goods sold by him in that State. A tax on a bill of lading of goods for export, is a tax on the goods; hence, a Federal tax on a domestic bill of lading is a direct tax on the
17 goods. Therefore, the occupations of tobacco dealers, salesmen, and transportation companies, are not subjects of an unapportioned Federal tax, and the taxes laid upon occupations, the

selling of property, and trades, found in the act of 1898 and earlier acts, are invalid. But the power of Congress to tax occupations, business, trades, transfers of property, and contracts, has long since been recognized. Railroad Co. *v.* Collector, 100 U. S. 593, 598; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 576, 577. To such consequences does the defendant's reasoning lead. Syllogisms should not be fashioned upon judicial expressions detached from the particular inquiry at some former time under consideration. The present question is, whether a statute providing for a tax on contracts for the sale, and delivery, of certificates of stock lays a direct tax upon property within the meaning of the Constitution. It is a mere truism, that a tax, whatever its form, falls primarily on the tax-payer's property, for how otherwise could it be paid? If a farmer actually pay a tax for the privilege of following his vocation, is not something exacted from his farm, stock, or other property? The same is the case, if the tax be laid on the sale of the products of the farm. If a railroad company be taxed on bills of lading, the tax, when paid, is charged to operating expenses, and the result is precisely the same as if the tax were laid upon road-bed and equipment. Yet in no one of the three cases is the tax assessed on the property, nor is the property specifically subjected to the tax. The law commands, that when the owner shall do an act, for instance the act of selling property, he personally, in the first instance, shall pay a tax. So, if a tax, measured by the proceeds of sale, be laid on the privilege of selling articles in an
18 exchange, the vendor, in case of sale, will have the precise amount of money at night, as if the tax had been laid upon the sale of property, or upon the property itself. In short, the tax, however laid, when paid, burdens the tax-payer's property. But all this does not prove that the tax is direct. A system of taxation upon the sale of property is in essential elements different from a system that lays the tax directly upon property. The latter system is certain, because the tax is sure to arise and to be paid in any event. There is but a single condition requisite to the existence and payment of such tax, and that is, the existence of the property. The statute is direct in its application, and in theory payment is inevitable, and to such payment principal and income alike are pledged. But a tax, payable on the sale of property, is contingent upon, and is laid upon, an event that may never arise, and the tax, in the meantime, is non-existant. For example, a statute providing for a direct tax on a parcel of land is, save as delayed by the acts of assessment and levy, instant in its operation, and the tax attaches as a lien upon the land, from which it may be dissociated only by payment. A statute directing a tax on contracts of sale of land is entirely executory, and may never be executed, and the estate continues in the hands of the owner, without burden or incumbrance. In the case at bar, the affixing of the stamp awaits the sale, and even then the certificate passes without disability to the transferee. Hence, no burden is laid on the certificate, nor does it ever become liable for the payment of the tax. The law simply says to the vendor, "When you do an act you

shall pay a tax." Moreover, a provision for a direct tax on land at once decreases its beneficial value, whether it
19 be kept or sold, while a tax on an instrument of conveyance or transfer, leaves the enjoyment intact. The present owner and his heirs forever may hold the profit without dimunition of profit. In the one case the State in effect seizes the land by the force of the statute, and there is no latitude, no escape from the compulsory tribute; in the other, nothing is taken away from the enjoyment of rights of ownership, save that in the event of the owner engaging in the business transaction of selling or exchanging his property, a tax must be paid thereon, taking the form of a stamp duty on the indenture, or, if it be personal property, on a bill of sale, or contract. It is simply a tax upon transactions in business activities, or forms of commercial dealings, and may be sustained on several grounds. In the first place, the statute may rest upon the power of Congress to declare that any person, who shall engage in the business, that is occupation, of buying or selling certificates of stock, shall pay a tax measured by the price realized. Is not such a statute lawful? The buying and selling of stocks, not by brokers alone, but by a large number of persons in every community who profess some other main vocation, is an occupation more or less constant. This has become a business, a vocation, and is amenable to Federal taxation as such. These persons, maybe, could not be so well reached, if the statute laid a gross duty in the form of a license tax on the individual trader in stocks. But in any case, Congress has the power to distribute such tax upon each item of business falling under the traffic. For, if it may lay a tax of one hundred dollars on the vocation of buying and selling stocks, it may lay a tax on the sale of stocks at the rate of two cents "on each hundred dollars" sold. The principle that justifies an impost of ten dollars per annum on a baker, supports the right to lay a tax of a fraction of a mill on each
20 loaf of his bread. The principle that underlies the power, and not the peculiar form of its exercise, is regarded. Therefore, it is not an answer, that the instance charged may have been the only transaction of the dealer.

How many sales of certificates are necessary to constitute the business of a vendor of certificates, five, ten, twenty, or one, and at what state of his sale will his business be sufficiently apparent to compel the dealer to stamp his transactions? At what point in his business career does the statute become constitutional? The act of 1898, like that of 1862, provides for a tax on many and varied occupations. How many items of business may a person do under each vocation, and so far forth escape the tax? How many instances of sales must the Government show against a defendant to establish the validity of the statute as to him? A tax is laid upon retail vendors of tobacco. May a person sell tobacco now and then without paying a tax? So a tax is placed upon the vendors of liquor, but may a person escape compliance with this tax upon the plea that the transaction was his first, second, or some other in numerical order, and that he did not sell liquor for a business? Is the answer that the offender never did it before a defense against

the charge of violating the revenue statute? If such be the law, a tax may not be placed upon the occupation, business, or selling, of liquors, tobacco, or stock, or any other thing consumable or non-consumable, except under the necessity, in case of attempted enforcement, of proving beyond a reasonable doubt, that the vendor had made sufficient sales, so that it may be inferred that it was his regular vocation, and that he was engaged uniformly in the business. In that case the statute would become valid or invalid as the jury might determine. The law is that he shall not pursue a cer-
21 tain business, without paying the tax, and if Congress may validly declare that, it may declare that he shall not, untaxed, do any of the business acts that fall within the occupation. A person pursues a business or vocation, whether or not he announces it as his profession. It is what he does, and not what he professes, that determines. It seems to be a political rather than a judicial function to determine what shall constitute a business.

But, it may be answered that an unapportioned tax may not be laid upon sales of property, unless the tax, in whole or part, may be shifted to another. Such rule would preclude a tax upon occupations. Aside from that consideration, the ultimate incidence of the tax has been very sparingly employed in the solution of questions similar to the one now before the court. The discussions and opinions of political economists are useful for the instruction of legislators in enacting, rather than for judges in the interpretation of statutes, and the judgments of the court have often disregarded the conclusions of the systematic writers.

For instance, Mr. McCulloch (McCulloch's Taxation, p. 181), states: "Duties on coaches, carriages, * * * fall wholly on those by whom they are used, and cannot be shifted to any one else." But the Supreme Court decided that a tax on carriages was indirect in its nature. Hylton *v.* U. S., 3 Dall. 171. In Veazie *v.* Fenno, 8 Wall. 533, it was determined that an act of Congress, which provides "that every national banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amounts of the notes of any State bank, or State banking associations, paid out by them," did not lay a direct tax within the meaning of the Constitution. Mr. Chief Justice Chase said:

22 "Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words 'direct taxes' in the Constitution. We are obliged, therefore, to resort to historical evidence, and to seek the

meaning of the works in the use and in the opinion of those whose relations to the Government, and means of knowledge, warranted them in speaking with authority."

After such historical references, the learned Chief Justice adds,

"This review shows that personal property, *contracts, occupations, and the like, have never been regarded by Congress as proper subjects of a direct tax.*"

In Knowlton *v.* Moore, 178 U. S. 41, 82, Mr. Justice White said:

"It is true that in the income-tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts, and excises, which are not the essential equivalent of a tax on property generally, real or personal solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall."

In Nicoll *v.* Ames, 173 U. S. 519, the tax was measured pre-
23 cisely by the sum realized on the sale, and fell on the vendor or vendee, under the same economic law that would govern in the case at bar, for the law does not change accordingly as the same shares may be sold, within, or without, an exchange. The curious investigator will find much instruction, and gather no little suspicion of the doctrines of political economists, as guides to constitutional interpretation, if he will consult Professor Seligman's article on the "Shifting and incidence of taxation" in the Publications of the American Economic Association, vol. 7, p. 6, *et seq.* The narration of the disagreements past and present of these theorists may leave him in doubt whether the usual tax assessed upon real property is not after all indirect.

At this point the history of the taxation of contracts will be considered, and proper inference drawn therefrom. It does not appear from the discussion of counsel, or the opinions in the Pollock case, that contracts were the subject of direct taxation prior to the adoption of the Constitution, nor that economists or jurists have characterized them as such. But shortly after the formation of the National Government a system of laying stamp duties upon such contracts was inaugurated.

By chapter 11, of the act of July 6, 1797, a stamp duty was placed on "bonds, bills, * * * foreign or inland bill of exchange, promissory note, or other note for the security of money, * * * any certificate of a share in any insurance company, or any certificate of a share in the Bank of the United States, or of any State, or other bank," (section 1). Chapter 53, of the act of August 2, 1813, similarly laid a tax on any bond, obligation or promissory note or notes not issued by any bank, companies, or banker, as aforesaid, discounted by any such bank, company, or banker, and on
24 any foreign or inland bill or bills of exchange above fifty dollars, and having one or more endorsers. Chapter 119, of the act of 1862, 12 Stat. at Large, 479, laid a tax upon bank checks, inland bills of exchange, drafts or orders for the payment of money, certificates of stock in any incorporated company, certificates of deposit, brokers' note, or memorandum of sale of any goods or merchandise, stocks, bonds, exchange, notes of hand, real estate, or property of any kind or description issued by brokers or persons acting as such, also, any "deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons by his, her, or their direction," also, any "lease, agreement, memorandum, or contract for the hire, use, or rent of any land, tenement, or portion thereof;" also, any "mortgage of lands, estate, or property, real or personal, heritable or movable whatsoever, where the same shall be made a security for the payment of any definite and certain sum of money, * * * ; also any conveyance of any lands, estate, or property, whatsoever, in trust to be sold or otherwise converted into money, which shall be intended only as security," &c.

Hence, it is seen that from an early period in the history of the national life, the power has been exercised of imposing a stamp duty upon personal obligations, certificates of stock of corporations, bonds, notes, and similar securities discounted at banks, and that at a later period, upon similar obligations, as well as upon conveyances, leases, mortgages, brokers' notes or memoranda of sale of stock, bonds, goods or merchandise. In all this there has been full acquiescence, and the power of the Government has been so thoroughly
25 recognized that in Knowlton *v.* Moore, 178 U. S. 41, 59, Mr. Justice White met an objection to the power of the Government to lay the taxes there involved, by saying:

"Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership, are subject more or less to State regulations, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, *even in the form of a stamp duty.* It cannot be doubted that the argument when reduced to its essence demonstrates its unsoundness, since it leads to the necessary conclusion that both the national and State governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them."

And well might the learned justice use such vigorous expression,

for stamp duties have been uniformly upheld. In Attorney General *v.* The Queen Ins. Co., 3 App. Cases, 1090, there is helpful discussion. The judgment of the privy council states:

"The single point to be decided upon this is whether a stamp act,—an act imposing a stamp on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt, in a court of law, if the stamp is not affixed,—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and in trying to find out their meaning we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the courts of law. Taken in either way there is a multitude of authorities to show that such a stamp imposed by the legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice Taschereau (in the court below) in his elaborate judgment it is not necessary here to do more than refer to. But surely if one could have been found in favor of the appellants, it was the duty of the appellants to call their lordships' attention to it. No such case has been found. Their lordships, therefore, think they are warranted in assuming that no such case exists. As regards judicial interpretation, there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There, again, they are all one way. They all treat stamps either as indirect taxation, or as not being direct taxation."

26 It will now be inquired, why a government that has power to lay an indirect tax upon a bond for the payment of money, may not lay the same tax upon the sale, that is, the act of transferring, or (and) the contract for transferring, the bond from one holder to another. What is there so inherently different in the contracts, as to enable a court to affirm the validity of a tax in one case, and to deny it in the other? Both are contracts; both are founded upon the same presumable consideration; both are business transactions, involving a contractual relation. If A issue his promissory note to B, for one thousand dollars, upon receiving that sum from B, and B agree to sell it to C, and accordingly does deliver it to C for one thousand dollars, upon what possible theory may the Federal Government place an unapportioned tax on the transaction between A and B, and be denied the ability to place a like tax on the transaction between B and C? The only conceivable answer is that the premise is false, but this would deny the power of Congress to lay the usual stamp tax on bills or notes. Passing to another assumption, if A, corporation, issue shares of stock to B for one thousand dollars, upon receipt of that sum, and B contract to sell them to C, and accordingly does deliver them to C for one thousand dollars,

upon what theory may the court affirm the power of the Federal Government to lay an unapportioned tax upon the transaction between A and B, and deny the power to lay a like tax upon the transaction between B and C? Is it because A is a corporation, and the tax is upon the corporate privilege? Does not the State give the privileges of the corporation to the stockholders, and if the Government may tax one privilege, may it not tax the other? Membership
27 in a corporation created by the State is an artificial privilege, similar, if not equal in degree, to that in an incorporated exchange, and the benefits of incorporation are the only advantages conferred by the State in the latter case, and to the opportunities afforded in both cases the National Government is an entire stranger. Again, if the Federal Government may lay an unapportioned tax upon indentures, whereby land is conveyed, why may not a like tax be placed upon contracts for sales of stock? One class relates to the sale of land, and the other to the sales of shares. There is no intrinsic difference. If the tax is on the certificate, so it is on the land; if one transfer is given the protection flowing from registration, so is the other; if the tax shifts in one case, in which case does it shift? One contract carries the land, the other muniments of titles to shares. It is difficult to understand why speculations or investments in stock should be exempted, and exchanges or sales of real property exposed, to a stamp tax. It is illogical to affirm that an unapportioned tax upon one contract, for example, for the payment of money, is valid, and a tax upon a contract to sell property is invalid. Both tax an obligation, one to pay money for property received or to be received, one to exchange property for money. Thus, by looking at the inner nature of the transactions, it is found that all have the essence of contracts, and that it is upon the contracts, as embodying a business transaction, that the tax is laid. Whether upon the sale of stock, the stamp is required to be placed upon the books of the company, where the transfer is shown, on the transfer certificate, or on a memorandum of sale, the tax is upon the business or act of making a legal contract, and the basis of the power is precisely the same as that which justifies a tax upon
28 bills, notes, or certificates of shares as originally issued, or contracts of conveyance. Congress may tax contracts in any form; it may tax contracts to buy certificates, or contracts to sell the same. As to such buying or selling, it was said in Treat *v.* White, 181 U. S., 264, 268, where this very statutory provision was involved, "The power of Congress in this direction is unlimited." In Knowlton *v.* Moore, Mr. Justice White adopted the following definition:

"Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange."

Thereupon it was demonstrated that an inheritance or legacy tax is laid upon the transmission of property. But, what is "transmission" but the transfer of title by one person to another, vesting possession at the time when the enjoyment of the first holder or owner ceases by the termination of his life. If the donor effected

the same distribution of his property in his lifetime, would not Congress have equal power to tax it? The assumed right of the Federal Government to lay death duties has no less remot- basis than the highly theoretical and practically unknown power of the State government to seize and confiscate the property of an unoffending citizen, who dies leaving heirs or donees. But the basic theory upon which such tax rests does not change the fact that it is imposed upon the transfer of the title of the property. The State has the power to regulate the use of property, and to direct under what reasonable limitations sales thereof shall be made. As a basis of taxation this power enures to Congress, quite as much as does the power to regulate successions. The conception that the State may theoretically confiscate property at the death of the owner, but may only regulate its use and sale during his life, points to a difference in degree of authority. The power of the State to regulate
29 is a true and genuine dominion; it is constantly exercised; it furnishes some real basis for taxation; the power to appropriate a decedent's property is the merest speculation, which no civilized State would ever venture to use.

The tax in question falls precisely within the definition stated by Mr. Justice White, because it relates to the act of sale, which act has two constituent elements, an agreement to sell, and consequent delivery. The two constitute an event upon which the tax takes effect. This event is a business transaction; as such Congress has taxed it, and as regards the power to do so, it is immaterial whether there is one event isolated, or many events aggregated, so as to constitute a person's uniform or usual vocation.

It may be of inconsiderable importance, whether an apportioned tax upon sales of property could be collected. Unlike a State, Congress, having in view the necessities of maintenance, must fix upon a gross sum and exactly apportion it. If this sum were laid upon the sales of property, the allotment to New York might be exceeded, while in Dakota a deficiency might arise. For the succeeding year the deficiency must necessarily be included in the gross sum to be raised, whereby it would result, that under a new apportionment the amount of deficiency in Dakota would be apportioned anew to the States and collected therefrom. Hence, it would happen that the States meeting their allotment might and probably would make up the deficiency of others, and the very theory of apportionment would be violated. The excess in New York and the deficiency in Dakota would raise equally embarrassing questions. While the question of inconvenience or impossibility of placing a tax upon sales of property does not prove that the tax is indirect, it
30 illustrates that it is based upon contingent events, and not upon property, and that in the uncertainties attending it, is unlike known direct taxes.

It is desirable to summarize the foregoing views. (1) The expressions in the cases, where no tax was valid, that a tax on vendors, or occupations, or shipping bills, was a forbidden tax on the commodities, would, if applied to instances, where the taxing power has been uniformly recognized, vitiate the same. (2) In whatever

form a tax is laid, its payment must be primarily from the tax-payer's property, and in this sense the same is the subject of the tax. (3) A statute providing for a direct tax with certainty burdens by lien, or generally, the tax-payer's property, and in theory appropriates *pro tanto* his income and incumbers his principal, while a statute providing for a tax on sales interrupts no enjoyment of property, makes no exaction from principal or income, beyond placing a tax upon a transaction attending the disposition of property, to wit, the contract for the sale and the act of transfer; but in the present case the certificates pass unaffected to the vendee. (4) The right to tax a pursuit, occupation, or business, involves the right to tax the same, in whatsoever limited degree it is adopted and followed, so that a right to tax one for carrying on the business of selling shares of stock involves the power to tax the sale of a single share of stock, that is, a tax on vendors may be limited to a single instance of vending. (5) The right to lay an unapportioned tax on sales is not limited to sales of commodities, whereby the tax may be shifted, in whole or in part, and the conflicting views of the economists should influence the legislature, and not constrain the courts. (6) The history of legislation shows similar instances where, after the adoption of the constitution, the power was exercised to tax contracts for the payment of money, and the transfer of property,
31 and the genuine nature of such contracts is the same as the subject of the act in question. The validity of such taxes is illustrated by their long and uniform enforcement by the court. (7) Taxes on sales or transfers of property are indirect within the holding of the Supreme Court. (8) The fact that the tax is difficult, if not impossible, of apportionment, indicates that it is based upon contingent events, and quite unlike the tax usually conceived as direct.

The defendant's contention seemingly is, that in the procession of constitutional interpretation, some reason has just now appeared, that should awaken the courts to a fundamental error, of which all men for a century have been profoundly unconscious. But such attention as is due the inquiry from the trial court confirms the wisdom of the past, and the power of Congress to lay the tax.

The demurrer should be overruled.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) U. S. circuit court.—United States *vs.* George C. Thomas.—Opinion overruling demurrer.—U. S. circuit court, southern district of New York, Filed Jan. 29, 1902, John A. Shields, clerk.

32 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms in the borough of Manhattan, in the city of New York, on Friday, the 31st day of January, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable Edward B. Thomas, circuit judge.

UNITED STATES
vs.
GEORGE C. THOMAS.

This cause coming on to be heard upon a demurrer to the indictment heretofore filed, and having been argued pro and con in open court, on the 24th day of December, 1901, by Messrs. Pavey & Moore in behalf of the defendant and by William S. Ball, Esq., assistant attorney, in behalf of the United States, and the matters having been duly considered by the court, now on motion of Honorable Henry L. Burnett, United States attorney, it is

Ordered, adjudged and decreed that the said demurrer be and the same is hereby in all things overruled, and the defendant has leave to plead over on the first day of the next term of this court, beginning on the 12th day of March at 10½ o'clock in the forenoon.

EDWARD B. THOMAS, *U. S. J.*

33 (Endorsed:) U. S. circuit court.—United States *vs.* George C. Thomas.—Order overruling demurrer and leave to plead over.—U. S. circuit court, southern district of New York, Filed Jan. 31, 1902, John A. Shields, clerk.

34 Circuit Court of the United States, Southern District of New York, Criminal Branch.

THE UNITED STATES
vs.
GEORGE C. THOMAS.

The following pages "1" to "7" inclusive approved as containing a true and complete transcript of the proceedings and evidence had on the trial of the cause of The United States, plaintiff, against George C. Thomas, defendant, and hereby ordered on file as a part of the record in said cause.

EDWARD B. THOMAS, *U. S. J.*

Dated, March 25th, 1902.

35 Circuit Court of the United States, Southern District of New York, Criminal Branch.

THE UNITED STATES
vs.
GEORGE C. THOMAS. } Before Hon. E. B. Thomas, C. J., and a Jury.

NEW YORK, *March 12th*, 1902.

Appearances: Mr. Henry L. Burnett, U. S. attorney; Mr. W. S. Ball, assistant to U. S. attorney, for the Government; Hon. F. D. Pavey for the defendant.

The defendant asks the court to allow the defendant an exception to the order and judgment of the court entered on the 31st day of January, 1902, overruling the demurrer to the indictment filed in this case on the 10th day of December, 1901.

Exception granted.

The defendant pleads not guilty.

A jury having been called, accepted and sworn, the case was opened for the Government by Mr. Ball.

THOMAS DE W. SCOBLE, a witness called on behalf of the Government, being duly sworn, testifies as follows:

36 Examined by Mr. BALL:

Q. Are you acquainted with the defendant George C. Thomas?

A. Yes, sir.

Q. Did you ever have any dealings with him in regard to the purchase of any stocks of any kind?

A. Many times.

Q. Do you remember a transaction on the 15th of May, 1901, in which he sold you some Atchison preferred?

A. Yes, sir.

Q. Will you please look at this memorandum and state whether or not that is the memorandum of the sale in that case?

A. That is the memorandum, sir.

Q. Will you please state what that represents?

A. It represents 100 shares of the Atchison, Topeka & Santa Fe preferred which I bought of him at 92⅜.

Q. Is that the memorandum he turned over to you upon that transaction?

A. Yes, sir.

Counsel for the Government asks the court and jury to take notice that there are no stamps upon the memorandum.

Q. Is that memorandum in the shape now that it was when he passed it to you?

Counsel for the defendant objects to the question and suggests that the direct question be asked whether at the time that memorandum was delivered any stamps were on it, to which he will object.

Q. At the time that memorandum of sale was delivered to you were there any stamps upon it of any kind?

Defendant's counsel objects to the question as immaterial and irrelevant.

37 The defendant objects to the question as immaterial and irrelevant upon the ground that the failure or refusal of the defendant to affix stamps to a bill or memorandum of the sale of shares or certificates of stock does not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or cer

tificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and, more particularly, in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Objection overruled. Exception taken.

A. There were no stamps affixed to it.

Q. It is now in exactly the shape that it was when it was passed over to you?

A. Yes, sir.

Memorandum of sale offered in evidence and received as Exhibit 1.

38 Government rests.

Mr. PAVEY: We offer no evidence, and the defendant moves the court to direct the jury to return a verdict of not guilty forthwith, without retiring to consider their verdict, upon the ground that the facts are not controverted and the facts as proven on the trial of the case do not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Motion denied. Exception taken.

Mr. PAVEY: I ask the court to instruct the jury:

The defendant requests the court to instruct the jury that those portions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or

39 certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;"

and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The COURT: I decline to so charge.

Exception taken.

Charge of the Court.

The COURT, THOMAS, *J.*:

GENTLEMEN OF THE JURY: The indictment charges the sale and transfer of stock from this defendant as indicated in the exhibit that is brought to your attention, without the placing thereon of the revenue stamps required by the statute which is known as the war-revenue statute, and that the defendant refrained from placing the said stamps upon such transfer for the purpose of evading payment of the tax which the statute requires to be paid under such circumstances.

The sole defence is that the statute itself is unconstitutional. That question has heretofore come before me upon a demurrer to this indictment, and I have fully examined the question and overruled the demurrer and held the statute to be constitutional,
40 so that you are to accept the statute as a valid law, and as the facts are uncontradicted it is for you to render a verdict in accordance with those facts.

I would say further that this proceeding is to a degree for the purpose of testing the validity of the law. That the defendant has been guilty of no wrong—has not refused to pay the tax except upon the ground that has been stated.

Unless there are further requests to charge it is unnecessary for me to say anything further to you.

Mr. PAVEY: I except to that portion of the charge in which you direct the jury that it must accept the statute in question as valid law, upon the ground that it is an improper and incorrect statement of the law applicable to the case at bar.

The COURT: Of course you may retire, if you desire to, gentlemen of the jury.

The FOREMAN: We do not think it necessary.

The jury rendered a verdict of "Guilty."

Mr. PAVEY: I would like to make a motion for a new trial.

The defendant moves the court to set aside the verdict of the jury and grant a new trial to the defendant upon the following grounds:

1. The court erred in overruling the objection of the defendant and allowing testimony to be taken and evidence to be introduced under the indictment in this case in reference to the failure or refusal of the defendant to affix stamps to the bill or memorandum of sale set forth in said indictment.

41 2. The court erred in overruling the motion of the defendant for a direction to the jury to bring in a verdict of not guilty.

3. The court erred in denying the request of the defendant to charge the jury.

The COURT: I deny the motion for a new trial.

Exception taken.

The COURT: I understand that he has paid all except with reference to this particular instance.

Mr. PAVEY: And it has been collected by distraint, levying upon funds in his office.

The COURT: Yes, but it is all paid up.

Mr. PAVEY: Yes, sir.

The COURT: And he is obeying the law since that time and paying under protest?

Mr. PAVEY: Entirely. I have a memorandum showing the entire preparation of the case.

The COURT: The sentence of the court is that the defendant be fined $500 and committed until the sum is paid, to the Ludlow Street jail, or until he is otherwise discharged by law.

Mr. PAVEY: Now I make my motion in arrest of judgment:

The defendant moves the court to arrest the judgment in the case upon the ground that the facts alleged in the indictment and proven on the trial do not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment
42 of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Motion denied. Exception taken.

Mr. PAVEY: I ask that the defendant be paroled in my custody until we arrange the matter.

The COURT: There is no objection to that, and a stay of 30 days. He may give his own recognizance for $1,000 and I stay the execution of the judgment for 30 days.

We agree that the foregoing pages numbered "1" to "7" inclusive contain a true and complete transcript of the proceedings and evidence had on the trial of the cause of The United States, plaintiff, against George C. Thomas, defendant, and consent that the same be ordered on file as part of the record in said cause.

Dated, March 24th, 1902.

HENRY L. BURNETT,
U. S. Attorney.

WM. S. BALL,
Assistant to United States Attorney for Plaintiff.

PAVEY AND MOORE,
Attorneys for Defendant.

43 (Endorsed:) Circuit court of the United States, southern district of New York.—United States *vs.* George C. Thomas.—Transcript of proceedings and evidence.—Pavey & Moore, attorneys for George C. Thomas, 32 Nassau street, New York city.—Due and timely service of a copy of the within transcript is hereby admitted. Dated March 25th, 1902. Henry L. Burnett, attorney for United States.—U. S. circuit court, southern district of New York, Filed Mar. 25, 1902, John A. Shields, clerk.

44 WEDNESDAY, *March 12th*, 1902.

Before Hon. Edward B. Thomas, Judge.

THE UNITED STATES *vs.* GEORGE C. THOMAS. } Act of March 2, 1901, Amending War-revenue Law of 1898, Schedule "A" One.

On motion of U. S. attorney, ordered trial, defendant present.

Jurors Sworn.

William S. Lalor	Alexander C. Milne
Nathan Morgenstern	Ernest J. Weil
Frank D. Woodward	Olney B. Dowd
Andrew P. Nahmens	Max G. Ernest
Charles W. Whitney	Stephen H. Tyng, Jr.
James D. Westervelt	Francis M. Baumann

Evidence in Behalf of Prosecution.

THOMAS D. SCOBLE, sworn.

Motion that court direct verdict of acquittal made by defendant's attorney. Denied.

Without summing up by counsel:

Charge is thereupon given by the court to the jury who say that they find the defendant guilty of the charges in the indictment contained, and so say they all.

45 Motion for new trial made by defendant's attorney and denied.

On motion of U. S. attorney ordered sentence.

The court thereupon proceeds to pass judgment and sentence the prisoner to pay a fine of five hundred dollars ($500), to stand committed until same is paid, or he shall be otherwise discharged according to law.

Motion in arrest of judgment made by defendant's attorney, thirty (30) days' stay granted in which to make and serve bill of exceptions. Defendant paroled in custody of attorney.

Ordered that defendant give $1,000 bail, pending appeal.

46 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Be it remembered that on this 13th day of March, in the year of our Lord one thousand nine hundred and two, before me, John A.

Shields, clerk of the circuit court of the United States, for the southern district of New York, personally came George C. Thomas, and acknowledged himself to owe to the United States of America the sum of one thousand dollars ($1,000) if default should be made in the conditions following, to wit:

Whereas on the 12th day of March, 1902, at a term of the circuit court of the United States held in and for the southern district of New York the above-named George C. Thomas was convicted on an indictment charging him with a violation of the war-revenue laws of the United States, and on the 12th day of March, 1902, the said court pronounced judgment and sentence against the above-named George C. Thomas, and

Whereas a writ of error from such judgment will be prayed for, and the said George C. Thomas having been allowed to give bail in the sum of one thousand dollars, pending the determination of such writ of error,

Now therefore, the condition of this recognizance is such that if upon the judgment of the supreme court upon said writ of error from the judgment of said circuit court as aforesaid the said George C. Thomas shall personally appear before said circuit court whenever and as soon as a judgment upon the mandate of the said supreme court shall be entered in said circuit court and then
47 and there surrender himself to the marshal of said circuit court and abide the order of the said circuit and supreme courts, then this recognizance will be void, otherwise to remain in full force and virtue.

GEO. C. THOMAS.

Acknowledged before me this 13th day of March, 1902.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George C. Thomas of 307 West 77th street in the city of New York, being duly sworn deposes and says that he is worth the sum of ten thousand dollars over and above all his just debts and liabilities.

GEO. C. THOMAS.

Sworn to before me this 13th day of March, 1902.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

(Endorsed:) Circuit court of the United States, southern district of New York.—The United States *vs.* George C. Thomas.—Recognizance.—U. S. circuit court, southern district of New York, Filed Mar. 13, 1902, John A. Shields, clerk.

48 Supreme Court of the United States.

UNITED STATES
vs.
GEORGE C. THOMAS.

Comes now the above-named defendant and plaintiff in error, George C. Thomas, by Pavey & Moore, his attorneys, and files the following assignment of errors upon which he will rely in his prosecution of the writ of error directed by the Supreme Court of the United States of America to the circuit court of the United States of America for the southern district of New York in the above-entitled cause.

I. The circuit court erred in overruling the demurrer of the defendant to the indictment filed in said cause on the 10th day of December, 1901.

II. The circuit court erred in allowing the admission of evidence of the absence of any stamps on the memorandum of sale in this cause at the time of its delivery against the objection of the defendant as follows:

Q. At the time that memorandum of sale was delivered to you were there any stamps upon it of any kind?

Defendant's counsel objects to the question as immaterial and irrelevant.

The defendant objects to the question as immaterial and irrelevant upon the ground that the failure or refusal of the defendant to affix stamps to a bill or memorandum of the sale of shares or certificates of stock does not constitute a crime against the peace and dignity of the United States nor an infringement of the laws
49 of the United States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and, more particularly, in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Objection overruled. Exception taken.

A. There were no stamps affixed to it.

III. The circuit court erred in denying the motion of the defendant that the court direct the jury to return a verdict of not guilty forthwith without retiring to consider their verdict. The said motion and the ruling were as follows:

Mr. PAVEY: We offer no evidence, and the defendant moves the court to direct the jury to return a verdict of not guilty forthwith, without retiring to consider their verdict, upon the ground that the facts are not controverted and the facts as proven on the trial of the case do not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United
50 States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Motion denied. Exception taken.

IV. The circuit court erred in declining to charge the jury as requested by the defendant. The said request and the ruling were as follows:

Mr. PAVEY: I ask the court to instruct the jury:

The defendant requests the court to instruct the jury that those portions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more
51 particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The COURT: I decline to so charge.

Exception taken.

V. The circuit court erred in that portion of its charge to the jury in which it directed the jury that it must accept the statute in question as valid law. The portion of said charge in which the court erred and the exception taken are as follows:

The COURT, THOMAS, *J.*:

"* * * The sole defense is that the statute itself is unconstitutional. That question has heretofore come before me upon a demurrer to this indictment, and I have fully examined the question

and overruled the demurrer and held the statute to be constitutional, so that you are to accept the statute as a valid law, and as the facts are uncontradicted it is for you to render a verdict in accordance with those facts. * * *."

Mr. PAVEY: I except to that portion of the charge in which you direct the jury that it must accept the statute in question as valid law, upon the ground that it is an improper and incorrect statement of the law applicable to the case at bar.

VI. The circuit court erred in denying the motion of the
52 defendant for a new trial. The said motion and the ruling were as follows:

Mr. PAVEY: I would like to make a motion for a new trial.

The defendant moves the court to set aside the verdict of the jury and grant a new trial to the defendant upon the following grounds:

1. The court erred in overruling the objection of the defendant and allowing testimony to be taken and evidence to be introduced under the indictment in this case in reference to the failure or refusal of the defendant to affix stamps to the bill or memorandum of sale set forth in said indictment.

2. The court erred in overruling the motion of the defendant for a direction to the jury to bring in a verdict of not guilty.

3. The court erred in denying the request of the defendant to charge the jury.

The COURT: I deny the motion for a new trial.

Exception taken.

VII. The circuit court erred in denying the motion of the defendant in arrest of judgment. The said motion and the ruling were as follows:

Mr. PAVEY: Now I make the motion in arrest of judgment.

The defendant moves the court to arrest the judgment in the case upon the ground that the facts alleged in the indictment and proven on the trial do not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expend-
53 itures and for other purposes" approved June 13, 1898, and known as the war-revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Motion denied. Exception taken.

Wherefore, the said defendant and plaintiff in error prays that said judgment of the said circuit court of the United States of

America for the southern district of New York be reversed and such directions given that he be restored to all that which he has lost by reason of said judgment.

PAVEY AND MOORE,
Attorneys for Defendant and Plaintiff in Error,
32 Nassau Street, Borough of Manhattan, New York, N. Y.

54 (Endorsed:) Supreme Court of the United States.—United States *vs.* George C. Thomas.—Assignment of errors.—Pavey & Moore, attorneys for George C. Thomas.—Due and timely service of a copy of the within assignment is hereby admitted.—Dated March 25th, 1902, Henry L. Burnett, attorney for United States.—U. S. circuit court, southern district of New York, Filed Mar. 25, 1902, John A. Shields, clerk.

55 Circuit Court of the United States, Southern District of New York.

UNITED STATES
vs.
GEORGE C. THOMAS. } Bond for Damages and Costs.

Know all men by these presents, that I, George C. Thomas, am held and firmly bound unto the above-named United States in the sum of two hundred and fifty and $\frac{00}{100}$ dollars, to be paid to the said United States for the payment of which well and truly to be made, I bind myself, my heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with my seal and dated the 24th day of March in the year of our Lord nineteen hundred and two.

Whereas, the above-named George C. Thomas has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States, for the southern district of New York.

Now therefore, the condition of this obligation is such, that if the above-named George C. Thomas shall prosecute said writ of error to effect and answer all damages and costs if he fail to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GEO. C. THOMAS. [SEAL.]

Sealed and delivered, and taken and acknowledged, this 24th day of March, 1902, before me—

GEO. E. POULSON,
Notary Public. N. Y. Co.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

George C. Thomas being duly sworn, deposes and says that
56 he is worth the sum of five hundred dollars, over and above all his just debts and liabilities. GEO. C. THOMAS.

Sworn to before me this 24th day of March, 1902.

GEO. E. POULSON,
Notary Public, N. Y. Co.

(Endorsed:) Circuit court of the United States, southern district of New York.—United States *vs.* George C. Thomas.—Bond for damages and costs.—Pavey & Moore, attorneys for George C. Thomas, 32 Nassau St., New York city.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the plaintiff of the right at any time to examine the surety under oath, touching his assets, liabilities and financial condition generally, Edward B. Thomas, U. S. circuit judge.—U. S. circuit court, southern district of New York, Filed Mar. 25, 1902, John A. Shields, clerk.

57 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein George C. Thomas is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

[Seal of U. S. Circuit Court, South. Dist. New York.]

EDWARD B. THOMAS, *U. S. J.*

March 25th, 1902.

58 [Endorsed:] E. & A. B. 1923. Supreme Court of the United States. George C. Thomas, plaintiff in error, *vs.* United States, defendant in error. Citation to defendant in error. Pavey & Moore, attorneys for plaintiff in error, 32 Nassau street, borough of Manhattan, New York city. To —— ——, Esq., attorney for —. Due and timely service of a copy of the within citation is hereby admitted. Dated, March 25th, 1902. Henry L. Burnett, attorney for United States. U. S. circuit court southern district New York. Filed Mar. 25 1902 John A. Shields, clerk.

[Endorsed:] U. S. Supreme Court. George C. Thomas, pl'ff in error *vs.* The United States of America def't in error.

Endorsed on cover: File No. 18503. S. New York C. C. U. S. Term No., 650. George C. Thomas, plaintiff in error, *vs.* The United States. Filed April 18, 1902.

FILE COPY.

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Livingston Middleditch Co., 65 Duane St. Telephone, Franklin 126.

Office Supreme Court U. S.
FILED
OCT 3 1903
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903,

No. 43.

GEORGE C. THOMAS,
Plaintiff in Error,

AGAINST

THE UNITED STATES.

Motion to Re-assign.

Now comes the plaintiff in error and respectfully moves this court to continue the argument in this cause and re-assign it for hearing upon such day as the case of Chesebrough *v.* The United States, is set for hearing.

The plaintiff in error was indicted by the Grand Jury of the United States Circuit Court for the Southern District of New York, being charged with the crime of violating the Internal Revenue Laws of the United States in that on or about the 15th day of May, 1901, having sold one hundred shares of Atchison Preferred Stock, at the time of such sale he delivered to the vendor a memorandum of sale, and that with intent to evade the provisions of Section 25, schedule "A" of an "Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes," approved June 13, 1898, he failed to affix thereto the proper stamps to denote the amount of the tax due the Government under the provisions of such Act. The plaintiff in error demurred

to the indictment upon the ground that the facts alleged in said indictment did not constitute an infringement of or a crime against the laws of the United States, for the reason that the portions of the Act of Congress entitled an "Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes," upon which the said indictment was based, are unconstitutional and void, because they are in violation of the Constitution of the United States, and more particularly of Article I, Section 2, subdivision 3, and Article I, Section 9, subdivision 4 thereof. Such demurrer was overruled, and the defendant was put on trial, tried, convicted and sentenced. From such conviction a writ of error was allowed to this court.

That upon motion of the attorneys for the plaintiff in error, this cause was continued from April to the October Term, 1903, so that it might be heard at the same time as the case of Chesebrough *v.* The United States, No. 152, October Term, 1903.

We are informed that a motion is made for a continuance of the hearing in the case of Chesebrough *v.* The United States, and a re-assignment of said cause for hearing, upon some day subsequent to November 1st, 1903, and the Honorable Attorney-General has expressed his willingness to concur in such motion.

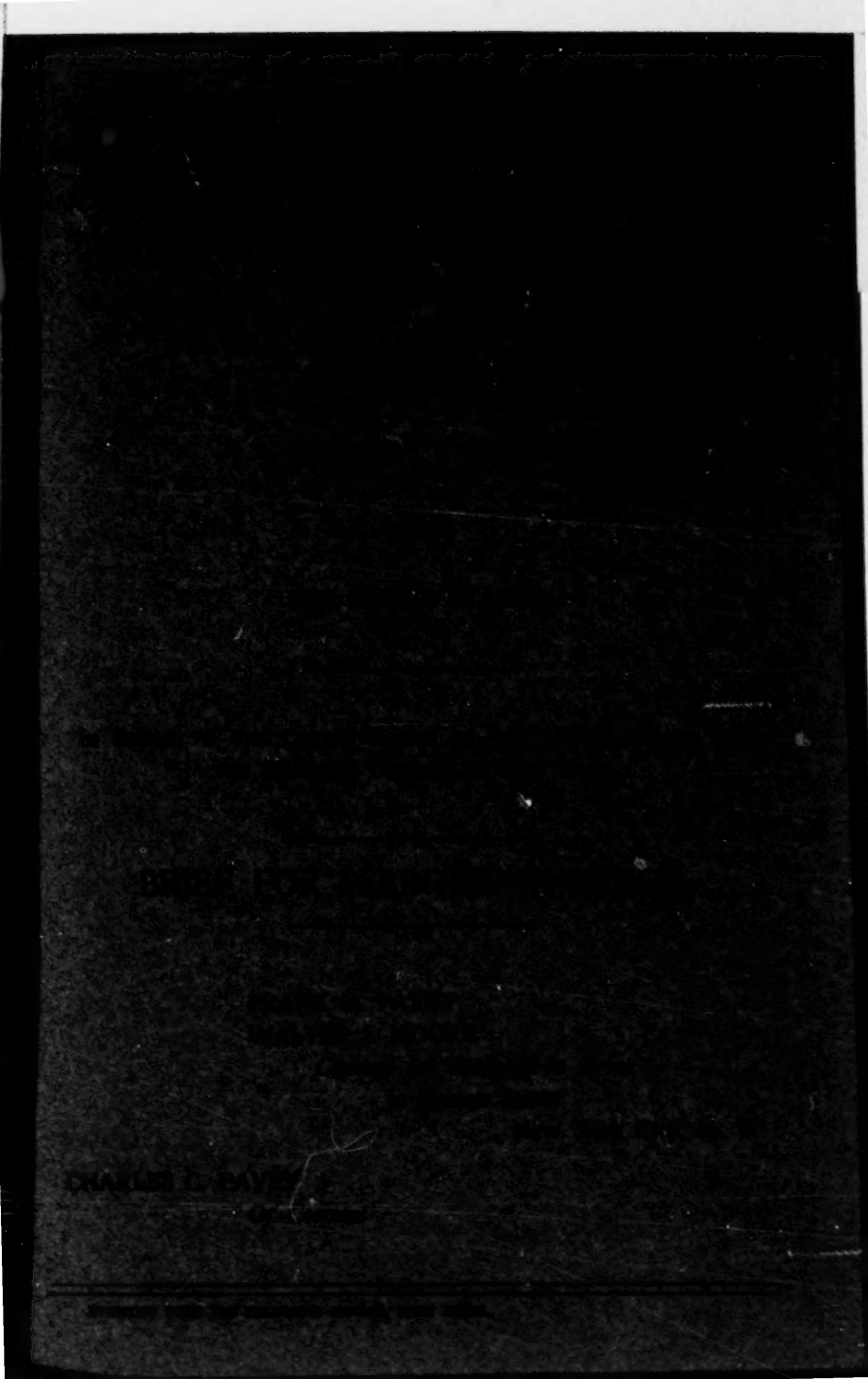
For the reasons above set forth, and for the reason that the questions involved herein are of like import to the questions involved in the case of Chesebrough *v.* The United States, the plaintiff in error respectfully moves the court to continue this cause and assign it for hearing upon the same day as Chesebrough *v.* The United States.

Dated, September 23d, 1903.

Respectfully submitted,

PAVEY & MOORE,
Attorneys for Plaintiff in Error.

FRANK D. PAVEY,
Counsel.



5034

Supreme Court of the United States

OCTOBER TERM, 1903

No. 43

GEORGE C. THOMAS

Plaintiff in Error

against

THE UNITED STATES

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF IN ERROR

FRANK D. PAVEY
WALTER J. MOORE
Counsel for Plaintiff in Error
32 Nassau Street
New York City, N. Y.

CHARLES C. PAVEY
Of Counsel

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Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 43.

GEORGE C. THOMAS,
Plaintiff in Error,
AGAINST
THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On December 10, 1901, the Grand Jury within and for the Southern District of New York in the Second Circuit indicted the plaintiff in error for having sold on the 15th day of May, 1901, in the City of New York one hundred shares of Atchison preferred stock to one T. D. Scoble and for having unlawfully and willfully made and delivered to said Scoble a memorandum of said sale without having affixed to said memorandum the proper revenue stamps as required by an act of Congress popularly known as the "War Revenue Law" approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes" (30 U. S. Statutes, 448, 451, 458), with in-

tent to evade the provisions of Section 25, Schedule A, of said act. (Record, p. 3)

The plaintiff in error demurred to this indictment upon the ground that the facts alleged in the indictment did not constitute an infringement of or a crime against the laws of the United States for the reason that those portions of the act upon which the indictment was based were unconstitutional and void because they were in violation of the Constitution of the United States and more particularly in violation of article 1, section 2, subdivision 3, thereof which provides that "representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers", and of article 1, section 9, subdivision 4, thereof which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken". The demurrer was overruled on January 31, 1902, and an exception granted. (Record, pp. 4, 5, 17, 18)

On March 12, 1902, the plaintiff in error was tried upon a plea of not guilty. During the trial he objected to the following question put to said T. D. Scoble, a witness for the government, viz.: "At the time that memorandum of sale was delivered to you, were there any stamps upon it of any kind?" as immaterial and irrelevant upon the ground that the failure or refusal of the defendant to affix stamps to a bill or memorandum of the sale of shares or certificates of stock did not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the same reasons stated in the demurrer. This objection was overruled and an exception taken. (Record, pp. 19, 20)

When the Government rested, the plaintiff in error offered no testimony and moved the court to direct a verdict for him upon the ground that the facts were not controverted and that the facts as proven on the trial of the case did not constitute a

crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the same reasons stated in the demurrer to the indictment. This motion was denied and an exception taken. (Record, p. 20)

Thereupon the plaintiff in error asked the court to instruct the jury that those portions of the law in question which required the payment of stamp taxes upon the sales of shares or certificates of stock were unconstitutional and void for the same reasons stated in the demurrer to the indictment. The court declined to so charge the jury and an exception was taken. (Record, pp. 20, 21)

The court instructed the jury that it must accept the statute as valid law. The plaintiff in error took an exception to this portion of the charge to the jury upon the ground that it was an improper and incorrect statement of the law applicable to the case. (Record, p. 21)

The jury rendered a verdict of guilty. (Record, p. 21)

Thereupon the plaintiff in error moved the court to set aside the verdict of the jury and grant a new trial upon the following grounds:

> "1. The court erred in overruling the objection of the defendant and allowing testimony to be taken and evidence to be introduced under the indictment in this case in reference to the failure or refusal of the defendant to affix stamps to the bill or memorandum of sale set forth in said indictment.
>
> "2. The court erred in overruling the motion of the defendant for a direction to the jury to bring in a verdict of not guilty.
>
> "3. The court erred in denying the request of the defendant to charge the jury."

The motion for a new trial was denied and the plaintiff in error took an exception. (Record, p. 21)

The sentence of the court was that the plaintiff in error be fined $500 and committed to jail until

the fine was paid or he was otherwise discharged by law. (Record, p. 22)

Thereupon the plaintiff in error made a motion in arrest of judgment for the same reasons stated in the demurrer to the indictment which was overruled and an exception taken. (Record, p. 22)

From this trial and judgment the plaintiff in error perfected his writ of error in this Court and now prays a reversal of the judgment of said Circuit Court.

LEGAL QUESTIONS INVOLVED.

Two legal questions are presented in the record:

1. The tax levied by "Schedule A" of the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes", on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company or corporation, is a direct tax.

2. The direct tax thus imposed not being apportioned among the several States according to their respective numbers, that portion of the act imposing said tax upon which said indictment and conviction is based is unconstitutional and void because it is in violation of the Constitution of the United States, and more particularly in violation of subdivision 3, section 2, article 1, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers", and of subdivision 4, section 9, article 1, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken".

THE WAR REVENUE LAW.

The portions of the War Revenue Law material to these questions are as follows:

"ADHESIVE STAMPS."

"SECTION 6. That on and after the first day "of July, eighteen hundred and ninety eight- "there shall be levied, collected and paid, for "and in respect of the several bonds, deben- "tures or certificates of stock and of indebt- "edness, and other documents, instruments, "matters, and things mentioned and described "in Schedule A of this act, or for or in re- "spect of the vellum, parchment or paper "upon which such instruments, matters, or "things, or any of them, shall be written or "printed by any person or persons, or party "who shall make, sign, or issue the same, or "for whose use or benefit the same shall be "made, signed, or issued, the several taxes "or sums of money set down in figures "against the same, respectively, or otherwise "specified or set forth in the said schedule."

* * * * * *

"SCHEDULE A."

"Stamp Taxes."

"Bonds, debentures, or certificates of in- "debtedness issued after the first day of July, "Anno Domini eighteen hundred and ninety- "eight, by any association, company, or cor- "poration, on each hundred dollars of face "value or fraction thereof, five cents, and on "each original issue, whether on organization "or reorganization, of certificates of stock by "any such association, company, or corpora- "tion, on each hundred dollars of face value "or fraction thereof, five cents, *and on all "sales, or agreements to sell, or memoranda "of sales or deliveries or transfers of shares "or certificates of stock in any association, "company, or corporation, whether made upon "or shown by the books of the association, "company, or corporation, or by any assign-*

" *ment in blank, or by any delivery, or by any*
" *paper or agreement or memorandum or other*
" *evidence of transfer or sale whether entitling*
" *the holder in any manner to the benefit of*
" *such stock, or to secure the future payment*
" *of money or for the future transfer of any*
" *stock, on each hundred dollars of face value*
" *or fraction thereof, two cents: Provided,*
" that in case of sale where the evidence of
" transfer is shown only by the books of the
" company the stamp shall be placed upon
" such books; and where the change of owner-
" ship is by transfer certificate the stamp
" shall be placed upon the certificate;
" *and in cases of an agreement to*
" *sell or where the transfer is by de-*
" *livery of the certificate assigned in blank*
" *there shall be made and delivered by the*
" *seller to the buyer a bill or memorandum of*
" *such sale, to which the stamp shall be af-*
" *fixed;* and every bill or memorandum of sale
" or agreement to sell before mentioned shall
" show the date thereof, the name of the
" seller, the amount of the sale, and the mat-
" ter or thing to which it refers. And any
" person or persons liable to pay the tax as
" herein provided, or any one who acts in the
" matter as agent or broker for such person
" or persons, who shall make any such sale, or
" who shall in pursuance of any such sale de
" liver any such stock, or evidence of the sale
" of any such stock or bill or memorandum
" thereof, as herein required, without having
" the proper stamps affixed thereto, with in-
" tent to evade the foregoing provisions shall
" be deemed guilty of a misdemeanor, and
" upon conviction thereof shall pay a fine of
" not less than five hundred nor more than
" one thousand dollars, or be imprisoned
" not more than six months, or both, at the
" discretion of the Court."

SPECIFICATIONS OF ERRORS.

I.—The Circuit Court erred in overruling the demurrer of the defendant to the indictment filed in said cause on the 10th day of December, 1901.

II.—The Circuit Court erred in allowing the admission of evidence of the absence of any stamps on the memorandum of sale in this cause at the time of its delivery against the objection of the defendant as follows:

Q. At the time that memorandum of sale was delivered to you were there any stamps upon it of any kind?

Defendant's counsel objects to the question as immaterial and irrelevant.

The defendants objects to the question as immaterial and irrelevant upon the ground that the failure or refusal of the defendant to affix stamps to a bill or memorandum of the sale of shares or certificates of stock does not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the reason that the provisions of the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the war revenue law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and, more particularly, in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers"; and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportions to the census of enumeration hereinbefore directed to be taken".

Objection overruled. Exception taken.

A. There were no stamps affixed to it.

III.—The Circuit Court erred in denying the motion of the defendant that the Court direct the

jury to return a verdict of not guilty forthwith without retiring to consider their verdict. The said motion and the ruling were as follows:

Mr. Pavey: We offer no evidence, and the defend ant moves the Court to direct the jury to return a verdict of not guilty forthwith, without retiring to consider their verdict, upon the ground that the facts are not controverted and the facts as proven on the trial of the case do not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States for the reason that the provisions of the Act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes" approved June 13, 1898, and known as the War Revenue Law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers"; and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Motion denied. Exception taken.

IV.—The Circuit Court erred in declining to charge the jury as requested by the defendant. The said request and the ruling were as follows:

Mr. Pavey: I ask the Court to instruct the jury:

The defendant requests the Court to instruct the jury that those portions of the act of Congress entitled "An Act to provide ways and means to meet war expenditures and for other purposes," approved

June 13, 1898, and known as the War-Revenue Law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3 thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4 thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The Court: I decline to so charge.

Exception taken.

V.—The Circuit Court erred in that portion of its charge to the jury in which it directed the jury that it must accept the statute in question as valid law. The portion of said charge in which the Court erred and the exception taken are as follows:

The Court, THOMAS, *J.*:

"* * * The sole defense is that the statute itself is unconstitutional. That question has heretofore come before me upon a demurrer to this indictment, and I have fully examined the question and overruled the demurrer, and held the statute to be constitutional, so that you are to accept the statute as a valid law, and as the facts are uncontradicted it is for you to render a verdict in accordance with those facts. * * *"

Mr. Pavey: I except to that portion of the charge in which you direct the jury that it must accept the statute in question as valid law, upon the ground that it is an improper and incorrect statement of the law applicable to the case at bar.

VI.—The Circuit Court erred in denying the motion of the defendant for a new trial. The said motion and the ruling were as follows:

Mr. Pavey: I would like to make a motion for a new trial.

The defendant moves the Court to set aside the verdict of the jury and grant a new trial to the defendant upon the following grounds:

1. The Court erred in overruling the objection of the defendant and allowing testimony to be taken and evidence to be introduced under the indictment in this case in reference to the failure or refusal of the defendant to affix stamps to the bill or memorandum of sale set forth in said indictment.

2. The Court erred in overruling the motion of the defendant for a direction to the jury to bring in a verdict of not guilty.

3. The Court erred in denying the request of the defendant to charge the jury.

The Court: I deny the motion for a new trial.

Exception taken.

VII.—The Circuit Court erred in denying the motion of the defendant in arrest of judgment. The said motion and the ruling were as follows:

Mr. Pavey: Now, I make the motion in arrest of judgment.

The defendant moves the Court to arrest the judgment in the case upon the ground that the facts alleged in the indictment and proven on the trial do not constitute a crime against the peace and dignity of the United States nor an infringement of the laws of the United States, for the reason that the provisions of the act of Congress, entitled "An

act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898, and known as the War Revenue Law of 1898, which require the payment of stamp taxes upon the sales of shares or certificates of stock are unconstitutional and void, because they are in violation of the Constitution of the United States, and more particularly in violation of article 1, section 2, subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers"; and of article 1, section 9, subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Motion denied. Exception taken. (Record, pp. 25, 26, 27.)

BRIEF OF THE ARGUMENT.

A TAX UPON PROPERTY IS A DIRECT TAX WITHIN THE MEANING OF THE CONSTITUTION AND MUST BE APPORTIONED AMONG THE STATES IN PROPORTION TO THE CENSUS.

Pollock *vs.* Farmers' Loan & Trust Co., 157 U. S., 429, 583; 158 U. S., 601, 637.

Constitution of the United States, Article 1, Section 2, Subdivision 3; Article 1, Section 9, Subdivision 2.

SHARES AND CERTIFICATES OF STOCK ARE PROPERTY.

Jellenik *vs.* Huron Copper Mining Co., 82 Fed. Rep., 778.

Allen *vs.* Pegram, 16 Iowa, 163.

Mattingly *vs.* Roach, 84 Cal., 207.
Sargent *vs.* Franklin Ins. Co., 8 Pick., 90.
Weaver *vs.* Barden, 49 N. Y., 286.
23 Am. & Eng. Enc. Law, 590.
Cook on Corporations (4 Ed.), Vol. 1, p. 41.

THE RIGHT OF SALE AND TRANSFER IS AN INHERENT ATTRIBUTE OF PROPERTY.

1 Blackstone's Commentaries, 138.
2 Kent's Commentaries, 317, 320, 326.
Bouvier's Law Dictionary — Property.
Rutherford's Institutes, p. 20.
Puffendorf's Laws of Nature, p. 220.
Wynehamer *vs.* People, 13 N. Y., 396, 397.
Sherman *vs.* Elder, 24 N. Y., 381.
Toledo Bank *vs.* Bond, 1 Ohio St., 662.
Exchange Bank of Columbus *vs.* Hines, 3 Ohio St., 8.
Tod *vs.* Wick, 36 Ohio St., 385.
Kuhn *vs.* Common Council, 70 Mich., 537.
Arapahoe County *vs.* Printing Co., 15 Colo. App., 196.
Commonwealth *vs.* Maury, 82 Va., 883.
State *vs.* Kreutzberg, 114 Wis., 534.
In re Marshall, 102 Fed. Rep., 324.

A TAX UPON THE SALE OF ARTICLES IS IN SUBSTANCE A TAX UPON THE ARTICLES THEMSELVES AND IS INVALID IF A TAX LAID IN THE SAME MANNER UPON THE ARTICLES THEMSELVES IS INVALID.

Brown *vs.* Maryland, 12 Wheaton, 419, 444.
Welton *vs.* Missouri, 91 U. S., 275, 279.

Cook *vs.* Pennsylvania, 97 U. S., 566, 573.
Almy *vs.* California, 24 How., 174.
Nicol *vs.* Ames, 173 U. S., 509, 521.
Fairbank *vs.* United States, 181 U. S., 293.

A TAX UPON THE SALES OF SHARES OR CERTIFICATES OF STOCK IS IN SUBSTANCE A TAX UPON THE SHARES OR CERTIFICATES THEMSELVES. IT IS THEREFORE A TAX UPON PROPERTY AND IS A DIRECT TAX WITHIN THE MEANING OF THE CONSTITUTION. THE WAR REVENUE TAX UPON THE SALES OF SHARES OR CERTIFICATES OF STOCK IS NOT LAID IN PROPORTION TO THE CENSUS OR ENUMERATION OR APPORTIONED AMONG THE STATES ACCORDING TO THEIR NUMBERS AND IS THEREFORE UNCONSTITUTIONAL AND VOID.

ARGUMENT.

SOURCE OF FEDERAL POWER OF TAXATION.

All power of Federal taxation is derived from the Constitution of the United States. The Federal Government has no inherent power of taxation in any form. The authority of Congress to impose any tax must be found and exercised within the terms and subject to the limitations of the Constitution. In reference to Federal taxation the provisions of that instrument consist of a grant, two limitations upon that grant and a prohibition. These provisions are as follows:

"The Congress shall have power:

"1. To lay and collect taxes, duties, im-
"posts and excises; to pay the debts, and

" provide for the common defense and general
" welfare of the United States; but all duties,
" imposts and excises shall be uniform
" throughout the United States."

Article 1, Section 8, Subdivision 1.

" Representatives and direct taxes shall be
" apportioned among the several states which
" may be included within this Union, accord-
" ing to their respective numbers; * * *."

Article 1, Section 2, Subdivision 3.

" No capitation or other direct tax shall be
" laid, unless in proportion to the census or
" enumeration hereinbefore directed to be
" taken."

Article 1, Section 9, Subdivision 4.

" No tax or duty shall be laid on articles
" exported from any state * * *."

Article 1, Section 9, Subdivision 5.

The power of Congress to tax is tersely stated and defined by Mr. Chief Justice Chase in the License Tax Cases in the following language:

" It is true that the power of Congress to
" tax is a very extensive power. It is given
" in the Constitution, with only one exception
" and only two qualifications. Congress can-
" not tax exports, and it must impose direct
" taxes by the rule of apportionment, and
" indirect taxes by the rule of uniformity.
" Thus limited, and thus only, it reaches
" every subject, and may be exercised at
" discretion."

License Tax Cases, 5 Wall., 462, 471.

The same rule of construction applies to the grant, the limitation upon the grant and the prohibition of the power of taxation.

" We are not here confronted with a ques-
" tion of the extent of the powers of Congress,
" but one of the limitations imposed by the
" Constitution on its action, and it seems to
" us clear that the same rule and spirit of

"construction must also be recognized. If "powers granted are to be taken as broadly "granted and as carrying with them author- "ity to pass those acts which may be reason- "ably necessary to carry them into full "execution; in other words, if the Constitu- "tion in its grant of powers is to be so con- "strued that Congress shall be able to carry "into full effect the powers granted, *it is* "*equally imperative that where prohibition* "*or limitation is placed upon the power of* "*Congress that prohibition or limitation* "*should be enforced in its spirit and to its* "*entirety.*"

Fairbank *vs.* United States, 181 U. S., 288–9.

DIRECT TAXES—WHY SO RESTRICTED IN THE CONSTITUTION.

The purpose and object of these provisions in the Constitution of the United States are discussed at length by the members of this Court in many opinions, but particularly in the opinions in the Income Tax Case (Pollock *v.* Farmers' Loan & Trust Company, 157 U. S., 429; 158 U. S., 601). The importance of this case led to an exhaustive examination by counsel and by members of this Court of the meaning of the term "direct" and "indirect" taxes as understood by English-speaking people before and at the time of the founding of the Federal Government. This examination covered the fields of history, literature, lexicography, constitutional debates, congressional acts and judicial decisions. While all these sources of interpretation as to the meaning of the terms are valuable the final determination of their meaning in particular cases must be controlled by the purpose and intention of the Constitutional Convention in putting the terms into the Federal Constitution. The reasons which led the framers of the Constitution to insert the provision that direct taxes shall be apportioned and

that no capitation or other direct tax shall be laid unless in proportion to the census or enumeration are well stated in two of the opinions of the Income Tax Case.

Mr. Chief Justice Fuller said:

> "The states were about, for all national "purposes embraced in the Constitution, to be- "come one, united under the same sovereign "authority, and governed by the same laws. "But as they still retained their jurisdiction "over all persons and things within their "territorial limits, except where surrendered "to the general government or restrained by "the Constitution, they were careful to see to "it that taxation and representation should go "together, so that the sovereignty reserved "should not be impaired, and *that when Con- "gress, and especially the House of Repre- "sentatives, where it was specifically pro- "vided that all revenue bills must originate, "voted a tax upon property, it should be "with the consciousness, and under the re- "sponsibility, that in so doing the tax so "voted would proportionately fall upon the "immediate constituents of those who im- "posed it.*" (157 U. S., 556)

Mr. Justice Field said:

> "On the one hand, anything like oppres- "sion or undue advantage of any one State "over the others would be prevented by the "apportionment of the direct taxes among "the States according to their representa- "tion, and, on the other hand, anything like "oppression or hardship in the levying of "duties, imposts, and excises would be "avoided by the provision that they should "be uniform throughout the United States. "*This compromise was essential to the con- "tinued union and harmony of the States. "It protected every State from being con- "trolled in its taxation by the superior num- "bers of one or more other States.*" (157 U. S., 587–8)

The plaintiff in error maintains that the spirit and purpose of the restrictions in the constitution

are violated by the War Revenue Law. He maintains that under that law the property of certain States is controlled in its taxation and may be destroyed by the superior numbers of one or more other States.

THE POWER TO TAX INVOLVES THE POWER TO DESTROY.

The several States of the Union have the power to create associations, companies and coporations and to authorize the issue of shares or certificates of stock in such associations, companies and corporations. If Congress has the power under any guise to levy a tax in the nature of an excise—one which need not be apportioned among the States according to population—upon the sale or transfer of any share or certificate of stock, there is no limit to which a majority of representatives in Congress from States hostile to certain industrial associations, companies or corporations may tax the sale and transfer of their shares or certificates of stock—even until the limit of destruction be reached. Thus a majority in Congress will have the power to defeat the very safeguards provided against such legislation when it was stipulated that direct taxes should be apportioned among the several States according to numbers and that no capitation or other direct tax should be laid unless in proportion to the census.

If this Court concede that Congress has the power to levy any tax upon any sale of shares or certificates of stock without apportioning the tax according to population, then it must concede that Congress has the power to tax at pleasure to destruction any such personal property within the United States by placing so great a tax upon a single transfer or sale that the value of the property will be swallowed up in the tax. For if Congress has the power to levy without apportionment upon every sale or transfer of shares or certificates of stock a tax of two cents

upon each one hundred dollars of actual or face value, it has the power to levy upon every sale or transfer a tax of one hundred dollars upon each one hundred dollars of actual or face value.

Then the equilibrium and equality in matters of taxation stipulated for among the several States in the Federal Constitution will be defeated; then the principle stated by Mr. Justice Field in Pollock *vs.* Farmers' Loan & Trust Company that those provisions of the Constitution "protected every State from being controlled in its taxation by the superior numbers of one or more other States" will be nullified; and then it will be found that Congress can accomplish indirectly by legislation the same result which it cannot accomplish directly because of constitutional restrictions.

This line of argument may be denounced as foolishness because Congress would not do such an absurd thing; public sentiment would not tolerate it; and to carry taxation "to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government". This same line of argument, however, has on more than one occasion been advanced and treated by this Court with serious consideration. In McCulloch *vs.* Maryland (4 Wheaton, 316, 431), Mr. Chief Justice Marshall said:

> "That the power to tax involves the power
> "to destroy; that the power to destroy may
> "defeat and render useless the power to
> "create; * * * are propositions not to be
> "denied. But all inconsistencies are to be
> "reconciled by the magic of the word CONFI-
> "DENCE. * * * But is this a case of con-
> "fidence?"

And upon another occasion (Brown *vs.* State of Maryland, 12 Wheaton, 419, 439, 447), Mr. Chief Justice Marshall said:

> "It is obvious that the same power which
> "imposes a light duty can impose a very
> "heavy one, one which amounts to a pro-

" hibition. Questions of power do not depend
" on the degree to which it may be exercised
" at the will of those in whose hands it is
" placed. * * * We are told that such
" wild and irrational abuse of power is not to
" be apprehended, and is not to be taken into
" view when discussing its existence. All
" power may be abused. * * * It will
" not meet this argument to say that this
" state of things will never be produced; that
" the good sense of the States is a sufficient
" security against it. The Constitution has
" not confided this subject to that good sense.
" It is placed elsewhere. The question is,
" where does the power reside; not how far
" will it be probably abused."

To the same effect Mr. Justice Field, in Welton *vs.* Missouri (91 U. S., 275, 281), said:

" The power of the State to exact a license
" tax of any amount being admitted, no au-
" thority would remain in the United States
" or in this Court to control its action, how-
" ever unreasonable or oppressive."

So the power in Congress to levy any tax however small as an excise tax without apportionment upon the sale of shares or certificates of stock being admitted, "no authority would remain in the United States or in this Court to control its action, however unreasonable or oppressive".

A recent decision of this Court emphasizes this proposition. This same War Revenue Law in another paragraph imposed a tax of ten cents upon bills of lading for exports from any port in the United States. In Fairbank *vs.* United States, this portion of the act was held to be invalid and Mr. Justice Brewer in delivering the opinion of the Court said:

" The requirement of the Constitution is
" that exports should be free from any gov-
" ernmental burden. The language is 'no
" tax or duty.' Whether such provision is or
" is not wise is a question of policy with

"which the courts have nothing to do. We "know historically that it was one of the "compromises which entered into and made "possible the adoption of the Constitution. "It is a restriction on the power of Congress; "and as in accordance with the rules hereto- "fore noticed the grants of powers should be "so construed as to give full efficacy to those "powers and enable Congress to use such "means as it deems necessary to carry them "into effect, so in like manner a restriction "should be enforced in accordance with its "letter and spirit, and no legislation can be "tolerated which, although it may not con- "flict with the letter, destroys the spirit and "purpose of the restriction imposed. If, for "instance, Congress may place a stamp duty "of ten cents on bills of lading on goods to "be exported it is because it has power to do "so, and if it has power to impose this "amount of stamp duty it has like power to "impose any sum in the way of stamp duty "which it sees fit. And it needs but a mo- "ment's reflection to show that thereby it can "as effectually place a burden upon exports "as though it placed a tax directly upon the "article exported. * * * The power to "tax is the power to destroy."

Fairbank *vs.* United States, 181 U. S., 283, 290, 291.

The importance of the Income Tax Case lay in the fact that the income tax law was an attempt to levy a tax in a form which would not fall proportionately upon the constituents of the majority voting for the tax and the constituents of the minority voting against it. When the constitutionality of this law was presented for determination this Court arrived at the conclusion that not only taxes on real estate and the income thereof are direct taxes, but that taxes on personal property and the income thereof are likewise direct taxes within the meaning of the Federal Constitution. The Court defined in the following language two classes of direct taxes:

TWO CLASSES OF DIRECT TAXES.

"Our conclusions may, therefore, be summed
" up as follows:

" FIRST: We adhere to the opinion already
" announced, that, taxes on real estate being
" indisputably direct taxes, taxes on the rents
" or income of real estate are equally direct
" taxes.

" SECOND: We are of opinion that taxes on
" personal property, or on the income of per-
" sonal property, are likewise direct taxes."

Pollock *vs.* Farmers' Loan and Trust Co., 158 U. S., 601, 637.

These judicial definitions fix a new point of departure in arguments as to the constitutionality of Federal taxes. The contention of the plaintiff in error in the present case is twofold in character. He maintains that the original purpose and spirit of the Constitution is violated by the War Revenue Law. He maintains that the law is an attempt of a majority in Congress to levy a tax which will not fall proportionately upon the immediate constituents of those who imposed it. He maintains however that extensive argument *a priori* upon that question is rendered unnecessary by early and late decisions of this Court. The foundation of his argument is laid upon the decision of this Court that taxes upon personal property are direct taxes.

SHARES AND CERTIFICATES OF STOCK ARE PROPERTY.

It is now well settled that shares and certificates of stock are personal property.

Jellenik *vs.* Huron Copper Mining Co., 82 Fed. Rep., 778.

Allen *vs.* Pegram, 16 Iowa, 163.

Mattingly *vs.* Roach, 84 Cal., 207.

Sargent *vs.* Franklin Ins. Co., 8 Pick., 90.
Weaver *vs.* Barden, 49 N. Y., 286.
23 Am. & Eng. Enc. Law, 590.
Cook on Corporations (4 Ed.), Vol. 1, p. 41.

Some of the older authorities held that shares of stock were real or personal property according to the nature of the property of the corporation. This distinction is of no importance in this case. Under the decision of this Court in the Income Tax Case (Pollock *vs.* Farmers' Loan and Trust Company) taxes upon real and personal property are alike direct taxes.

THE RIGHT OF SALE AND TRANSFER IS AN INHERENT ATTRIBUTE OF PROPERTY.

"Property" includes the right to alienate and transfer a thing as well as the right to use and enjoy it. The earlier and later definitions of property recognize the right of sale as an inherent attribute of property.

1 Blackstone's Commentaries, 138.
2 Kent's Commentaries, 317, 320, 326.
Bouvier's Law Dictionary—Property.
Rutherford's Institutes, p. 20.
Puffendorf's Laws of Nature, p. 220.
Wynehamer *vs.* People, 13 N. Y., 396, 397.
Sherman *vs.* Elder, 24 N. Y., 381.
Toledo Bank *vs.* Bond, 1 Ohio St., 662.
Tod *vs.* Wick, 36 Ohio St., 385.
Kuhn *vs.* Common Council, 70 Mich., 537.
Arapahoe County *vs.* Printing Co., 15 Colo. App., 196.
Commonwealth *vs.* Maury, 82 Va., 883.
State *vs.* Kreutzberg, 114 Wis., 534.
In re Marshall, 102 Fed. Rep., 324.

This right and the authorities in support of it have been well defined and quoted in an opinion of the Court of Appeals of the State of New York.

> "Nor can I find any definition of property "which does not include the power of dis- "position and sale, as well as the right of "private use and enjoyment. Thus Black- "stone says (1 Com., 138): 'The third ab- "'solute right of every Englishman is that "'of property, which consists in the free use, "'enjoyment and *disposal* of all his acquisi- "'tions, without any control or diminution, "'save only by the laws of the land.' "Chancellor Kent says (2 Com., 320): 'The "'exclusive right of using and *transferring* "'property follows as a natural consequence "'from the perception and admission of the "'right itself.' And again (p. 326): 'The "'power of *alienation of property* is a neces- "'sary incident to the right, and was dic- "'tated by mutual convenience and mutual "'wants.' By another author, property is "defined as an 'exclusive right to things, "'containing not only a right to use "'those things, but a right to *dispose* "'of them, either by exchanging them "'for other things, or giving them away to "'any other person without consideration, "'or even throwing them away' (Bouvier's "Law Dictionary—Property). These defini- "tions are in accordance with the general "sense of mankind. Indeed, if any one can "define property eliminated of its attributes, "incapable of sale, and placed without the "protection of law, it were well that the at- "tempt should be made."
>
> Wynehamer *vs.* The People, 13 N. Y., 896.

The same rule has been stated by the courts of many other States.

> "We agree with the learned counsel for "the relator that property does not consist "merely of the title and possession. It in- "cludes the right to make any legal use of it,

"and the right to pledge or mortgage it, or "*to sell and transfer it.*"

Kuhn *vs.* Common Council, 70 Mich., 537.

"It will thus be seen, that in order to con "stitute property which is subject to owner- "ship as the terms are used in their broad "sense, there must exist, not only the right "of use and enjoyment, but the *exclusive* "*right to alienate or transfer.*"

Arapahoe County *vs.* Printing Co., 15 Colo. App., 196.

The question in the case at bar is whether a tax "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company or corporation" is a tax upon the shares or certificates themselves.

A TAX UPON THE SALE OF ARTICLES IS IN SUBSTANCE A TAX UPON THE ARTICLES THEMSELVES AND IS INVALID IF A TAX LAID IN THE SAME MANNER UPON THE ARTICLES THEMSELVES IS INVALID.

Brown *vs.* Maryland, 12 Wheaton, 419, 444.
Welton *vs.* Missouri, 91 U. S., 275, 279.
Cook *vs.* Pennsylvania, 97 U. S., 566, 578.
Almy *vs.* California, 24 How., 174.
Nicol *vs.* Ames, 173 U. S., 509, 521.
Fairbank *v.* United States, 181 U. S., 293.

TWO RULES OF CONSTRUCTION.

In determining the constitutionality of any tax law there are two rules or principles of interpretation which always control. They are these:

FIRST.—The substance and not the form of a tax must control.

Brown *vs.* Maryland, 12 Wheaton, 419, 444.

Postal Telegraph Cable Co. *vs.* Adams, 155 U. S., 688, 698.

Pollock *vs.* Farmers' Loan and Trust Co., 157 U. S., 429, 581.

"The substance and not the shadow deter-
" mines the validity of the exercise of
" power."

Postal Telegraph Cable Co. *vs.* Adams, 155 U. S., 688, 698.

"It is the substance and not the form
" which controls, as has indeed been estab-
" lished by repeated decisions of this Court."

Pollock *vs.* Farmers' Loan and Trust Co , 157 U. S., 581.

Fairbank *vs.* The United States, 181 U. S., 283, 323.

SECOND. That which cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result.

Fairbank *vs.* United States, 181 U. S., 283,294.

These two principles of construction have been applied by this Court to many State statutes and to several acts of Congress. The leading if not the earlier case in point is that of Brown *vs.* Maryland, 12 Wheaton, 420. In 1827 a penal statute of the State of Maryland, which required all importers of foreign goods and merchandise to take out and pay for a license before they could sell any imported article was declared by this Court to be in conflict with that provision of the Federal Constitution which provides that "no state shall, without the consent of Congress, lay any impost or duty on im-

ports or exports, except what may be absolutely necessary for executing its inspection laws". Mr. Chief Justice Marshall delivered the opinion of the Court and the principles laid down by him apply with equal force to the subject now under consideration.

In answer to the argument that the tax laid by the Maryland statute was not a tax upon importations or the articles imported but was simply a tax upon the business of importation or of the importer as an importer, he said:

> "But if it should be proved that a duty on "the article itself would be repugnant to the "constitution, it is still argued that this is "not a tax upon the article, but on the per-"son. The State, it is said, may tax occupa-"tions, and this is nothing more."
>
> "It is impossible to conceal from ourselves "that this is varying the form, without vary-"ing the substance. It is treating a prohibi-"tion which is general, as if it were confined "to a particular mode of doing the forbid-"den thing. All must perceive that a tax on "the sale of an article, imported only for "sale, is a tax on the article itself. * * * "So, a tax on the occupation of an importer "is, in like manner, a tax on importation. "It must add to the price of the article, and "be paid by the consumer, or by the importer "himself, in like manner as a direct duty on "the article itself would be paid. This the "State has not a right to do because it is "prohibited by the Constitution." (12 Wheaton, 444)

The plaintiff in error submits that the portion of the War Revenue Law in question in the case at bar, while in form it purports to be a tax upon the transaction -the act of sale itself and not the property sold- is in effect a tax upon the shares or certificates of stock sold and transferred; for from the price or value of the shares or certificates of stock sold and transferred must be deducted the amount of the revenue stamps required by the act which

must be paid by the vendor in a like manner as a direct tax on the shares or certificates of stock would have to be paid by the owner. This, he contends, Congress has not the right to do because the tax being thus a direct tax *on property* and not laid in proportion to the population is repugnant to the Constitution.

The learned Judge in the trial court states the argument for the Government in the most plausible manner possible in the following language: (Record, p. 9)

> "A system of taxation upon the sale of "property is in essential elements different "from a system that lays the tax directly "upon property. The latter system is cer- "tain, because the tax is sure to arise and to "be paid in any event. There is but a single "condition requisite to the existence and pay- "ment of such a tax, and that is, the exist- "ence of the property. The statute is direct "in its application, and in theory payment is "inevitable, and to such payment principle "and income alike are pledged. But a tax "payable on the sale of property is con- "tingent upon, and is laid upon, an event "that may never arise, and the tax, in the "meantime, is non-existent. For example, a "statute providing for a direct tax on a parcel "of land is, save as delayed by the acts of "assessment and levy, instant in its opera- "tion, and the tax attaches as a lien upon the "land, from which it may be dissociated only "by payment. A statute directing a tax on "contracts of sale of land is entirely execu- "tory, and may never be executed, and the "estate continues in the hands of the owner, "without burden or incumbrance. In the "case at bar, the affixing of the stamp awaits "the sale, and even then the certificate passes "without disability to the transferee. Hence, "no burden is laid on the certificate, nor does "it ever become liable for the payment of the "tax. The law simply says to the vendor, "'When you do an act you shall pay a tax.'"
>
> Thomas, *J.*, United States *v.* Thomas.

This argument violates both of the rules above stated that "the substance and not the form of a tax must control", and that "that which cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result". Such a line of argument is refuted by this Court in the case of Brown *vs.* Maryland. Counsel for the State of Maryland attempted to draw a distinction between a license tax upon an importer, as an importer, and a tax or impost upon the article imported. In answer to this line of argument Mr. Chief Justice Marshall said:

> "Whether the prohibition to 'lay imposts, " ' or duties on imports or exports', proceeded " from an apprehension that the power might " be so exercised as to disturb that equality " among the States which was generally ad- " vantageous, or that harmony between them " which it was desirable to preserve, or to main- " tain unimpaired our commercial connections " with foreign nations, or to confer this source " of revenue on the government of the Union, " or whatever other motive might have in- " duced the prohibition, it is plain that the ob- " ject would be as completely defeated by a " power to tax the article in the hands of the " importer the instant it was landed, as by " a power to tax it while entering the port. " There is no difference, in effect, between a " power to prohibit the sale of an article and " a power to prohibit its introduction into the " country. The one would be a necessary " consequence of the other. No goods would " be imported if none could be sold."
>
> Brown *vs.* Maryland, 12 Wheaton, 420, 439.

Following the same line of argument, the contention of the plaintiff in error is that a tax levied upon the sale of shares or certificates of stock is as much a direct tax as a tax levied upon the article itself for in effect it says to every citizen "you need not pay any tax so long as you hold and keep these

shares and certificates of stock in your possession, but if for any reason you desire to sell or are compelled to sell or transfer them, in other words if you wish to exercise and enjoy one of the inherent attributes of property, then you must pay a tax".

So in Brown *vs.* Maryland the Maryland statute said to every citizen "you may import foreign goods and so long as you keep them you need not pay any duty or take out a license, but before you can sell them you must pay the State a license", and to this the Court said: "It is impossible to conceal from ourselves that this is varying the form without varying the substance". (Brown *vs.* Maryland, 12 Wheaton, 444)

OTHER ILLUSTRATIONS OF THE RULES OF CONSTRUCTION.

Other leading decisions of this Court illustrate the two propositions that "the substance and not the form of a tax must control", and that "that which cannot be done directly, because of constitutional restrictions, cannot be accomplished indirectly by legislation which accomplishes the same result".

I.—A statute of the State of Missouri required the payment of a license tax from travelling salesmen engaged in selling within the State goods, wares and merchandise which were not the growth, product or manufacture of the State and required no such license tax from persons selling in a similar way goods which were the growth, product or manufacture of the State. This statute was held to be in conflict with the power vested in Congress "to regulate commerce with foreign nations and among the several States". In delivering the opinion of the Court as to this statute Mr. Justice Field said:

> "Where the business or occupation con-
> "sists in the sale of goods, the license tax
> "required for its pursuit is in effect a tax

"upon the goods themselves. If such a tax
"be within the power of the State to levy, it
"matters not whether it be raised directly
"from the goods, or indirectly from them
"through the license to the dealer; but, if
"such a tax conflict with any power vested
"in Congress by the Constitution of the
"United States, it will not be any the less in-
"valid because enforced through the form of
"personal license."

Welton *vs.* Missouri, 91 U. S., 275.

So the appellant maintains that the tax complained of in the case at bar is not any less invalid because enforced through the form of a tax upon a sale or transfer.

II.—An act of the legislature of Pennsylvania required auctioneers to pay into the treasury of the State a graduated tax on all sales made by them of foreign or imported goods. This Court declared the act invalid upon the ground that the tax on sales of foreign goods was in effect a tax on the goods sold and necessarily void because contrary to the inhibition to the States to tax imports and in contravention of the exclusive power of Congress to regulate interstate commerce.

Cook *vs.* Pennsylvania, 97 U. S., 566.

III.—The State of California laid a stamp tax on certain instruments of writing including bills of lading for the transportation of gold and silver coin or bars from points within the State to points without the State. This law was held to be in effect a tax upon gold or silver exported and contrary to the provision of the Constitution which declares that "no State shall, without the consent of the Congress, lay any imposts, or duties on any imports or exports". Mr. Chief Justice Taney said:

"But a tax or duty on a bill of lading,
"although differing in form from a duty on

"the article shipped, is in substance the same "thing."

Almy *vs.* State of California, 24 How., 174.

This case was modified in a subsequent decision in the case of Woodruff *vs.* Parham (8 Wall., 123). The modification related to the definition of "imports" and "exports" as used in the Constitution but did not change or affect the rule above stated which has been recently affirmed by this Court in the following language:

"It is true that thereafter, in Woodruff "*vs* Parham, 8 Wall., 123, it was held that "the words 'imports' and 'exports' "as used in the Constitution were "used to define the shipment of articles "between this and a foreign country, and "not that between the States, and while "therefore that case (Almy *vs.* California) is "no longer an authority as to what is or "what is not an export, the proposition that "a stamp duty on a bill of lading is in effect "a duty on the article transported remains "unaffected. In other words, that decision "affirms the great principle that what can- "not be done directly because of constitu- "tional restrictions cannot be accomplished "indirectly by legislation which accomplishes "the same result."

Fairbank *vs.* United States, 181 U. S. 283, 294.

IV.—A State tax upon the bonds or stock of the United States is in substance a tax on the power of the Federal Government to borrow money on the credit of the United States and is therefore unconstitutional.

Weston *vs.* Charleston, 2 Peters, 449, 468.

V.—A Federal tax upon the income derived from municipal securities is in effect a tax on the power

of the States and their instrumentalities to borrow money and is therefore unconstitutional.

Pollock *vs.* Farmers' Loan and Trust Co., 157 U. S., 429, 586.

VI.—A State tax upon the income of a resident of the State derived from a Federal office is unconstitutional because it is in effect a tax upon the office, one of the instrumentalities of the Federal government in the execution of its powers.

Dobbins *vs.* Commissioners, 16 Peters, 435.

VII.—A State tax upon the gross receipts of a steamship company derived from interstate and foreign commerce is in effect a regulation of interstate and foreign commerce and therefore unconstitutional.

P. & S. Steamship Co. *vs.* Pennsylvania, 122 U. S., 326.

VIII.—A State tax on interstate commerce in any form whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation or on the occupation or business of carrying it on amounts to a regulation of interstate commerce and is therefore unconstitutional.

Leloup *vs* Port of Mobile, 127 U. S., 640, 648.

IX.—A tax deducted from the interest payable on bonds is in substance a tax upon the bonds themselves.

Railroad Co. *vs.* Jackson, 7 Wall., 262.

CONCLUSION OF ARGUMENT.

We are not left in this argument to analogies and decisions upon more or less remote State and Federal statutes. We have two decisions of this Court upon two paragraphs of "Schedule A" of this same War Revenue Law both of which affirm and sustain our position. These decisions were in the case of Nicol *vs.* Ames (173 U. S., 509) upholding the second paragraph and the case of Fairbank *vs.* United States (181 U. S., 283) annulling and holding void the fifth paragraph of "Schedule A".

Nicol *vs.* Ames was the earlier case. The decision involved the validity of that portion of "Schedule A" which provided that "upon each sale, agreement of sale, or agreement to sell any produce or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery" there should be levied a tax of one cent for each one hundred dollars in value or fractional part thereof and that the seller should deliver to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which a stamp should be affixed. This Court held that portion of the War Revenue Law to be valid because "the tax is in effect a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act".

Mr. Justice Peckham in announcing the decision of the Court said:

> "We think the tax is in effect a duty or
> "excise laid upon the privilege, opportunity,
> "or facility offered at boards of trade or ex-
> "changes for the transaction of the business
> "mentioned in the act. It is not a tax upon
> "the business itself which is so transacted,
> "but it is a duty upon the facilities made use

" of and actually employed in the transaction
" of the business, and separate and apart from
" the business itself. It is not a tax upon the
" members of the exchange nor upon mem-
" bership therein, nor is it a tax upon sales
" generally. The act limits the tax to sales at
" any exchange, or board of trade, or other
" similar place, and its fair meaning is to im-
" pose a duty upon those privileges or facili-
" ties which are there found and made use
" of in the sale at such place of any product
" or merchandise. * * *

" *A tax upon the privilege of selling prop-*
" *erty at the exchange and of thus using the*
" *facilities there offered in accomplishing the*
" *sale differs radically from a tax upon every*
" *sale made in any place. The latter tax is*
" *really and practically upon property.*"

Nicol *vs.* Ames, 173 U. S., 509, 519, 521.

The paragraph last quoted shows that the Court recognized the fact that if the paragraph of "Schedule A" in question in Nicol *vs.* Ames had levied the tax upon all sales made in any place it would have been a direct tax and would not have withstood the test of the Constitution under the rule of apportionment.

This is exactly the case which the plaintiff in error now presents for the consideration of this Court. He complains of a tax which is levied upon all sales or agreements to sell or transfers of shares or certificates of stock made in any place and which is not apportioned according to numbers.

Any doubt as to what Mr. Justice Peckham meant when he said that a tax upon every sale made in every place is really and practically upon property has been set at rest by the opinion of this Court delivered by Mr. Justice Brewer two years later in the case of Fairbank *vs.* United States. The Court said:

" In Nicol *vs.* Ames, 173 U. S., 509, we
" had occasion to consider this very act in

"reference to another stamp duty required "by the same schedule 'A', to wit, the "clause:

"'Upon each sale, agreement of sale, or "'agreement to sell, any products or mer-"'chandise at any exchange, or board of "'trade, or other similar place, either for "'present or future delivery, for each one "'hundred dollars in value of said sale or "'agreement to sell, one cent, and for each "'additional one hundred dollars, or frac-"'tional part thereof in excess of one hun-"'dred dollars, one cent.'

"We sustained that tax as a tax upon the "privilege or facilities obtained by dealings "on exchange, saying (p. 521):

"'A tax upon the privilege of selling prop-"'erty at the exchange and of thus using "'the facilities there offered in accomplishing "'the sale differs radically from a tax upon "'every sale made in any place. The latter "'tax is really and practically upon prop-"'erty.'

"If it be true that a stamp tax required "upon every instrument evidencing a sale is "really and practically a tax upon the prop-"erty sold, it is equally clear that a stamp "duty upon foreign bills of lading is a tax "upon the articles exported.

"These considerations find ample support "in prior adjudications of this Court."

Fairbank *vs.* United States, 181 U. S., 283, 293.

A TAX UPON THE SALES OF SHARES OR CERTIFICATES OF STOCK IS IN SUBSTANCE A TAX UPON THE SHARES OR CERTIFICATES THEMSELVES AND IS THEREFORE A DIRECT TAX UPON PROPERTY WITHIN THE MEANING OF THE CONSTITUTION. THE ACT IN QUESTION LAYING A TAX UPON THE SALES OF SHARES OR CERTIFICATES OF STOCK NOT IN PROPORTION TO THE CENSUS OR ENUMERATION AND

NOT APPORTIONED AMONG THE STATES ACCORDING TO THEIR NUMBERS IS UNCONSTITUTIONAL AND VOID.

THE JUDGMENT OF THE CIRCUIT COURT SHOULD BE REVERSED.

Respectfully submitted,

FRANK D. PAVEY,
WALTER J. MOORE,
Counsel for Plaintiff in Error.

CHARLES C. PAVEY,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 43.

GEORGE C. THOMAS, PLAINTIFF IN ERROR,

against

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

FRANK D. PAVEY,
WALTER J. MOORE,
Counsel for Plaintiff in Error.

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No. 43.

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vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The Assistant Attorney General, in his brief on behalf of the United States (pages 7, 8, and 9), has given a wrong citation for the law under consideration in this case. His quotations are taken from the amended act of March 2, 1901 (31 U. S. Statutes, 940–942), instead of the original act of June 13, 1898 (30 U. S. Statutes, 448–451–458). The language of the two acts are identical so far as the particular quotations are concerned, but the amended act of March 2, 1901, had not yet taken effect when the plaintiff in error committed the alleged crime for which he was indicted. The error in the citation of the law is of no importance so far as the portions quoted are concerned, but the court cannot use

that citation to the volume and page of the statutes for their examination of the law itself. The correct citation is 30 U. S. Statutes, 448, 451, 458.

Part I.

The general principles laid down in Part I of the brief of the Assistant Attorney General (pages 10–21), entitled "Preliminary Points Applicable to Federal Tax Laws Generally," are not objectionable to the plaintiff in error, who would merely suggest the following criticism of the implied purpose of Points IV and VI:

Point IV is as follows (page 14):

"The selection of the means rests with Congress. Unless these means are forbidden by the Constitution the courts will not interfere."

This appears to suggest that the selection of the means of taxation in the case at bar rests with Congress. The reply of the plaintiff in error to this point is that *direct taxation without apportionment is a means forbidden by the Constitution*. His contention is that under the law in question a direct tax is laid without apportionment, and that therefore Congress has selected a means of taxation forbidden by the Constitution.

Point VI is as follows (page 18):

"In exercising the taxing power Congress may through classification select the subjects of taxation and thus use its discretion in distributing equitably the burdens of government."

This again appears to suggest that the selection of the subject of taxation in the case at bar is merely a matter of classification within the discretion of Congress. The reply of the plaintiff in error is that there is no question of classification involved in this case. If Congress has power to levy a tax without apportionment upon any kind of personal

property, there appears to be no reason why it may not select shares or certificates of stock as the kind of personal property upon which it will levy an unapportioned tax.

Part II.

The plaintiff in error has no criticism to make of the portions of the brief of the Assistant Attorney General contained in Part II (pages 22–32), entitled "Constitutional Provisions which Expressly and by Necessary Implication Absolutely Exclude Articles of Export and the Agencies and Instrumentalities of the Various State Governments from the Domain of Federal Taxation."

The contention of the plaintiff in error is that the same rules of construction which apply to the *exceptions or prohibitions* of the taxing power of the Federal Government apply equally to the *limitations* upon that taxing power.

Part III.

The portion of the brief of the Assistant Attorney General which directly bears upon the contention of the plaintiff in error in the case at bar is found in Part III (pages 32–41), entitled "Constitutional Limitations upon the Manner in which Congress May Impose Any Particular Tax."

The Assistant Attorney General very properly says (page 34) that "whatever may be the precise meaning of the phrase 'direct tax' as understood and used by various writers on the subject of political economy, it is only necessary to an intelligent discussion of the validity of the law under consideration to ascertain and determine what is understood by the phrase 'direct tax' *within the meaning of the Constitution*." He sets forth the only direct taxes within the meaning of the Constitution which have been decided to be such by the opinions of this court (pages 35–36).

From 1789 to 1896 only two taxes had been recognized by this court as direct taxes—a capitation or poll tax and a tax on lands. From 1896 up to the present date three other taxes have been recognized by this court as direct taxes. The Assistant Attorney General defines these three taxes in the following language (page 36):

"3. A tax upon *all* one's personal estate by reason of one's general ownership thereof.
"4. A tax on the income of real property.
"5. A tax upon the income of personal property."

These three taxes were declared to be direct taxes in the case of Pollock *vs.* Farmers' Loan & Trust Co., 157 U. S., 429; 158 U. S., 601.

In order to escape from the force and effect of the decision in the second Income Tax Case (158 U. S., 601), the Assistant Attorney General endeavors to limit the scope of that decision, that a tax upon personal property is a direct tax. The limitation which he would put upon the scope of that decision is indicated by his insertion of the word "all" in his definition of direct tax No. 3, and stated in the following language (page 36):

"*True Scope of the Second Income Tax Case.*

"We maintain that the true scope of the second Income Tax Case in so far as it holds that a tax on personal property is a direct tax within the meaning of the Constitution refers simply to a tax imposed upon *all one's personal estate solely because of one's general ownership of such personal property*, and that this is apparent not only from the decision itself but from subsequent decisions of this court wherein the real meaning of that case in this particular was adverted to and made clear."

He defends this statement of his limitation of the scope of that decision by quotations from the argument of Alexander Hamilton in the Hylton case, from the opinion of this court

in the second Income Tax Case (158 U. S., 628), and from the opinion of this court in the case of Knowlton *vs.* Moore (178 U. S., 41–82). None of these quotations warrant the limitation of the scope of the second Income Tax Case to "*all*" one's personal estate.

The quotation from the writings of Alexander Hamilton is not an authority at all, because it was made by Hamilton in argument as an advocate in a case. Hamilton's comparative opinions as a statesman and as an advocate have been thus analyzed by this court in its opinion in the second Income Tax Case (158 U. S., 624, 625):

"Thus we find Mr. Hamilton while writing to induce the adoption of the Constitution, *first*, dividing the power of taxation into *external* and *internal*, putting into the former the power of imposing duties on imported articles and into the latter all remaining powers; and, *second*, dividing the latter into *direct* and *indirect*, putting into the latter duties and excises on articles of consumption.

"It seems to us to inevitably follow that in Mr. Hamilton's judgment at that time *all* internal taxes, except duties and excises on articles *of consumption*, fell into the category of direct taxes.

* * * * * * *

"Any loose expressions in definition of the word 'direct,' so far as conflicting with his well-considered views in the *Federalist*, must be regarded as the liberty which the advocate usually thinks himself entitled to take with his subject."

Pollock *vs.* Farmers' Loan and Trust Co., 158 U. S., 624–'5.

The quotatiens from the opinions of this court in the second Income Tax Case and in Knowlton *vs.* Moore do not warrant the Assistant Attorney General in inserting the word "all" in his definition of direct tax No. 3.

In the quotation from the opinion of this court in Knowlton *vs.* Moore, cited by the Assistant Attorney General in his brief (page 39), the word "all" does not qualify the very

correct definition given by the learned justice who delivered that opinion. That definition was a tax imposed upon a person "*solely because of his general ownership of personal property.*" The word "general" qualifies "ownership" and not "property."

The contention of the plaintiff in error is that the tax in the case at bar is imposed on his shares or certificates of stock "solely because of his general ownership of such shares or certificates of stock."

The definition of the Assistant Attorney General of tax No. 3 cannot be accepted as a correct statement of the scope of the second Income Tax Case, because the case stated in this definition was not before the court in the Income Tax Case.

In the Income Tax Case the question before the court was whether the tax upon the income from personal property was or was not a direct tax. No question was before the court as to whether a tax on personal property must be "imposed upon all one's personal estate solely because of one's general ownership of such personal property" in order that it should be a direct tax. The court, in delivering its opinion in the second Income Tax Case, in answer to the argument that a tax upon personal property was difficult or impossible of apportionment, made use of the illustration that "all the real estate of the country and all its invested personal property are open to the direct operation of the taxing power if an apportionment be made according to the Constitution," and added that "personal property of some kind is of general distribution, and so are incomes, though the taxable range thereof might be narrowed through large exemptions" (158 U. S., 628). But nowhere in the opinion in the second Income Tax Case did the court say that a tax on personal property must be levied on all the invested personal property of the country in order to become a direct tax. The court placed no limitation on its

decision that a tax upon personal property was a direct tax. The language of the court is as follows:

"Our conclusions may therefore be summed up as follows: * * *

"Second. We are of opinion that *taxes on personal property* or on the income of personal property are likewise direct taxes" (158 U. S., 637).

There is a further reason why this interpretation of the meaning of the decision of the second Income Tax Case can not be accepted as sound. If the Congress has power to levy without apportionment a tax upon some certain kinds of personal property and can escape the limitation of the Constitution unless it levies the tax "upon all one's personal estate by reason of one's general ownership thereof," it will practically have the power to levy an income tax upon the income derived from those certain kinds of personal property. The law in question in the Income Tax Case did not levy a tax upon the income derived from all one's personal estate. The law was filled with exemptions both as to amount and as to source of income. It was a particular instance of a law drawn for the purpose of taxing incomes derived from certain sources of property and work, and exempting incomes derived from certain other sources of property and work. This failure of Congress to levy the tax upon the incomes derived from "all one's personal estate" did not exempt the tax in question from the prohibition of the Constitution.

But if the question whether a tax upon personal property is a direct tax is to be determined by the test as to whether it is levied upon all one's personal estate, the Income Tax decision can be practically nullified by Congress. It can tax certain kinds of personal property specified in the law and measure the tax by the amount of the income derived from that property. There will be no limit to the number of kinds of personal property upon which an unapportioned

tax *measured by income* can be imposed, so long as the tax is not imposed "upon all one's personal estate solely because of one's general ownership of such personal property." It cannot have been the deliberate intention of this court to place an interpretation upon its decision in the second Income Tax Case which will open the door for such an absurd nullification of that decision.

The Assistant Attorney General further urges that a tax on shares or certificates of stock would be subject to the difficulty, if not the impossibility, of apportionment. This objection is of no force whatever. If it was the intention of the limitation in the Constitution to prevent a tax being laid without apportionment on shares and certificates of stock, the difficulty or impossibility of apportioning such a tax is no argument against the application of the limitation. In fact it is an argument in its favor, because the framers of the Constitution doubtless intended by the limitation to make such a tax so difficult of enforcement that it would never be laid.

Part IV.

In this part of his brief the Assistant Attorney General presents eight "various theories upon which the law may be sustained as imposing an indirect tax or a tax in the nature of a duty or excise."

The first theory is as follows (page 44):

(A.)

"*The tax here imposed is an indirect tax within every definition of that term contained in the many decisions of this court and the writings of leading authors on the subject of political economy.*"

In answer to this theory the plaintiff in error takes the position that he is not concerned with the writings of lead-

ing authors on the subject of political economy, and that his contention is simply and solely that the tax here imposed is a *direct* tax "within every difinition of that term contained in the many decisions of this court."

The second theory is as follows (page 49):

(B.)

"The tax here imposed is not a direct tax within the meaning of the Constitution for the reason that it is impossible to apportion it among the several States according to population."

There is no *impossibility* in the case. It is just as possible to apportion a tax upon the shares and certificates of stock among the States according to population as it is to apportion a tax upon land. There may be a resulting inequality in taxation or difficulty in collection, but that inequality in taxation or difficulty in collection would not be much greater in the case of stock than in the case of land at the present time. Moreover, this inequality in taxation and difficulty in collection is no argument that the tax is not a direct tax. In fact that very inequality of taxation and difficulty of collection were contemplated and intended by the framers of the Constitution, and that intention has been thus stated by this court in the decision of the first Income Tax Case:

"Nothing can be clearer than that what the Constitution "intended to guard against was the exercise by the General "Government of the power of directly taxing persons and "property within any State through a majority made up "from the other States. It is true that the effect of requir- "ing direct taxes to be apportioned among the States in pro- "portion to their population is necessarily that the amount "of taxes on the individual tax-payer in a State having the "taxable subject-matter to a larger extent in proportion to "its population than another State has, would be less than in "such other State, but this inequality must be held to have

"been contemplated, and was manifestly designed to operate "to restrain the exercise of the power of direct taxation to "extraordinary emergencies and to prevent an attack upon "accumulated property by mere force of numbers."

Pollock *vs.* Farmers' Loan & Trust Co., 157 U. S., 583.

"If in the changes of wealth and population in particular "States, apportionment produces inequality, it was an in- "equality stipulated for just as the equal representation of "the States, however small, in the Senate was stipulated for."

Pollock *vs.* Farmers' Loan & Trust Co., 158 U. S., 621.

The third theory is as follows (page 52:)

(C.)

"*The tax here imposed may be sustained on the theory that it is a tax in the nature of a duty or excise upon transactions in business activity or forms of commercial dealing.*"

This theory is defended by the Assistant Attorney General in the following language:

"It cannot be doubted that Congress has the power to declare that any person who shall engage in the business or occupation of buying and selling certificates of stock shall pay a tax measured by the price realized."

The answer to this theory is that an individual owner of shares or certificates of stock is taxed upon the sale of his own shares or certificates, although he is not engaged in the "business or occupation of buying or selling certificates of stock" within the decisions of this court.

This court has defined in the case of Warren *vs.* Shook (91 U. S., 704–710) who are engaged in the business or occupation of buying and selling certificates of stock in the following language:

"A broker is defined to be one whose business it is to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes, or other securi-

ties for himself or for others. Ordinarily the term 'broker' is applied to one acting for others; but the part of the definition which speaks of purchases and sales for himself is equally important as that which speaks of sales and purchases for others. All parts of the definition are qualified by the words 'whose business it is.' Thus if A. B. has $10,000 which he desires to invest and purchases United States stock or State stock or any other securities he does not thereby become a broker. Nor if he owns $10,000 of United States stock which he wishes to sell to raise money to pay his debts or because he is not satisfied with six per cent interest, is he thereby made a broker. It is only when making sales and purchases *is his business, his trade, his profession, his means of getting his living, or of making his fortune,* that he becomes a broker within the meaning of the statute."

Warren *vs.* Shook, 91 U. S., 704–710.

The fourth theory is as follows (page 54):

(D.)

"The law may also be defended on the theory that the tax imposed is in the nature of a duty or excise upon the contract of sale itself, referring only to the fact that the subject-matter of the sale must be a certificate of stock as the basis or ground for classification."

The answer of the plaintiff in error to this theory is that this court has repeatedly held that the effort to levy a tax upon sales is a mere subterfuge, no matter in what form it is presented, and that a tax upon sales is in substance a tax upon the articles sold. The decisions of this court in support of this assertion are cited in the brief of the plaintiff in error.

The fifth theory is as follows (page 57):

(E.)

"*The tax here imposed may be sustained on the ground of its close analogy to the tax involved in the case of Hylton vs. United States* (3 *Dallas*, 171)."

The answer to this theory is stated by the Assistant Attorney General himself in the following language:

"In the Hylton case the tax upon carriages was held to be an indirect tax in the nature of a duty or excise levied *upon the use of the carriage.*"

If in the decision of this case this court shall hold that the law in the case at bar levies a duty or excise *upon the use of the shares or certificates of stock*, then the tax will have been sustained on a ground analogous to the tax in the case of Hylton *vs.* United States. But the Assistant Attorney General contradicts himself. In another portion of his brief the Assistant Attorney General makes a point in favor of the validity of the tax, that it is not a tax on the use of the shares or certificates of stock. On page 46 he says:

"The owner of the stock is entitled to the possession thereof for all time absolutely free from the operation of this law. He likewise enjoys all the rights incident to the ownership of such property free from any tax."

The contention of the plaintiff in error is that the tax in question in the case at bar is not a tax upon the use of the shares or certificates of stock, because the owner of the shares or certificates can use them and enjoy their dividends or other income. But when he comes to exercise one of the inherent attributes of property, namely, the right of sale and transfer, he must pay a tax which in form is a tax upon the sale, but in substance is a tax upon the shares or certificates themselves.

The sixth theory is as follows (page 59):

(F.)

"The tax here imposed may be sustained upon the theory that it is laid upon the privilege or facility afforded the owner of the stock under and by virtue of the laws of the State authorizing the formation of the corporation to sell and dispose of his property in the form of a certificate of stock."

This theory carries its fallacy on its face. The tax here imposed is not limited to a sale of the certificate of stock. It is not limited to the sale of the seller's property in the form of a certificate of stock; the law taxes the sale of *shares as well as certificates* of stock in a corporation. This duplication of language was undoubtedly used to prevent any evasion of the tax on a technicality. Corporations may be organized with shares of stock and not issue certificates of stock. Plainly it is the sale of shares upon which the tax is really laid, whether any certificates of stock have been issued or not. The law provides for a tax on the sale of shares where the "transfer is shown only by the books of the company."

The theory that the tax is laid upon the privilege or facility afforded the owner of the stock under the corporation laws of the State to sell his shares is untenable. That is a privilege which is not conferred on the owner by the corporation laws of any State. The privilege of *acquiring* shares in a corporation is conferred by the State laws, but not the privilege of *selling* them. The corporation laws of the States confer the privilege of organizing a corporation and give the holders of the shares the right to manage and direct the business of the corporation, with such liabilities, privileges, and immunities as the charter and the law provide. That privilege is what is known as the franchise of being a corporation. Once a cor-

poration is organized in accordance with the laws of any State, that franchise itself becomes property of the corporation. Like any other property, it belongs to all the holders of the shares; but every holder's individual shares in the corporation and in its franchises or other property are his personal property. Once he has acquired them, they are no longer a matter of privilege, but a matter of right. His rights to his shares as property are as fully protected by every constitutional guarantee for the protection of property, either under the Federal Constitution or under the State constitutions, as are his rights to land or any other property. *His right of sale and transfer is an inherent attribute of his property in his shares as well as in his other property.*

The seventh theory is as follows (page 65):

(G.)

"A tax similar to the tax here under discussion has been uniformly regarded by the legislative and executive departments of the Government since its foundation as an indirect tax within the meaning of the Constitution."

In support of this theory the Assistant Attorney General cites the fact that three such taxes have been laid:

1. A tax on certain certificates of stock (1797).
2. A tax on certificates of stock (1862).
3. A tax on the sale or agreement to sell certificates of stock (1898).

The same facts existed in the case of Fairbank *vs.* The United States, and a similar argument was made in favor of the constitutionality of the tax on export bills of lading which was declared unconstitutional in that case. In addition to the portion of the opinion in that case quoted by the Assist-

ant Attorney General, the plaintiff in error wishes to quote the balance of the same opinion upon that point:

"We have no disposition to belittle the significance of this matter. It is always entitled to careful consideration and in doubtful cases will, as we have shown, often turn the scale; but when the meaning and scope of a constitutional provision are clear it can not be overthrown by legislative action, although several times repeated and never before challenged. It will be perceived that these stamp duties have been in force during only three periods: First, from 1797 to 1802; second, from 1862 to 1872; and, third, commencing with the recent statute of 1898. It must be borne in mind also in respect to this matter that during the first period exports were limited, and the amount of the stamp duty was small, and that during the second period we were passing through the stress of a great civil war or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution."

Fairbank *vs.* United States, 181 U. S., 311–312.

The eighth theory is as follows (page 67):

(H.)

"*And finally it is contended that an act of Congress imposing a tax directly upon all shares or certificates of stock in all corporations and associations would be constitutional. A fortiori, is a law constitutional which merely taxes the sale or agreement to sell such property*" (page 67):

The plaintiff in error admits that if Congress may tax directly, without apportionment, all shares or certificates of stock in all corporations and associations, the law in question, which merely taxes the sale or agreement to sell such prop-

erty, is constitutional. The plaintiff in error contends that none of the decisions of this court sustain the right of Congress to levy a tax directly, without apportionment, upon shares or certificates of stock or any other property except with reference to either its production or its consumption. In other words, in the language of this court in the case of Patton *vs.* Brady (184 U. S., 608), all such taxes upon certain kinds of property have "reference to their origin or their intended use."

In Conclusion.

The plaintiff in error has cited the cases of Brown *vs.* Maryland, Welton *vs.* Missouri, Cook *vs.* Pennsylvania, Almy *vs.* California, Nicol *vs.* Ames, and Fairbank *vs.* United States, not for the purpose of suggesting that any of the taxes in those cases were held to be direct taxes, but solely for the purpose of showing that a tax upon sales has been uniformly held by this court to be a subterfuge and in substance a tax upon the articles sold. The plaintiff in error relies upon these cases to maintain the proposition that the tax upon sales of shares or certificates of stock is in substance a tax upon the shares or certificates of stock themselves. He relies upon the other authorities cited in the brief to show that shares and certificates of stock are property, and that the right of sale and transfer is an attribute of property, and that a tax upon property in the form of a tax upon one of its essential attributes is a direct tax within the meaning of the Constitution as defined in the second Income Tax Case.

Respectfully submitted.

Frank D. Pavey,
Walter J. Moore,
Counsel for Plaintiff in Error.

Charles C. Pavey,
Of Counsel.

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JAMES H. McKENNEY

Stamp Taxes on Sales of Shares or Certificates of Stock.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 43.

GEORGE C. THOMAS, PLAINTIFF IN ERROR,

against

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ORAL ARGUMENT FOR PLAINTIFF IN ERROR.

FRANK D. PAVEY,
WALTER J. MOORE,
Counsel for Plaintiff in Error.

CHARLES C. PAVEY,
Of Counsel.

C. G. Burgoyne, Walker and Centre Street, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 48.

GEORGE C. THOMAS, PLAINTIFF IN ERROR,

against

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ORAL ARGUMENT FOR PLAINTIFF IN ERROR.

FRANK D. PAVEY,
WALTER J. MOORE,
Counsel for Plaintiff in Error.

CHARLES C. PAVEY,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 43.

GEORGE C. THOMAS, PLAINTIFF IN ERROR,

against

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ORAL ARGUMENT FOR PLAINTIFF IN ERROR.

The above-entitled cause came on for hearing on the fourth day of December, nineteen hundred and three, the Chief Justice and all the Associate Justices being in attendance. There were present on behalf of the plaintiff in error Mr. FRANK D. PAVEY and on behalf of the United States Mr. MILTON D. PURDY, Assistant Attorney-General.

The case having been called for argument Mr. PAVEY addressed the Court on behalf of the plaintiff in error.

MR. PAVEY: The sole question in this case is the question of the constitutionality of that portion of the War Revenue Law which lays a tax upon the sales of shares or certificates of stock in any corporation, company or association. Our contention is that the tax is a direct tax within the meaning of the Constitution; that it has not been apportioned among the States; and that therefore it is unconstitutional.

It is not necessary for me to review or to restate the general rules of construction of the powers of taxation which have been granted to Congress by the Federal Constitution. There are two points which the Attorney-General makes to which I wish to reply at the opening of my argument and then I will state the grounds upon which we base our contention that the law is unconstitutional.

He has stated in his argument in the Chesebrough case (and it is in his brief in this case) that there is an inherent power of taxation in every sovereignty. We contend that that is not a true statement of the power of taxation in the Federal Government because it is a government of limited powers and those powers are only the powers that were granted by the Constitution. No matter how broad the power of taxation may be that is granted by the Constitution the Federal Government has no inherent powers of taxation by reason of its sovereignty. It gets all its power of taxation from the Constitution of the United States and from no other source. The author-

ity of Congress to impose any tax must be found and exercised within the terms and subject to the limitations of the Constitution.

There is another point which is made by the Assistant Attorney-General and as nearly as I can restate his language it is that some of the decisions upon which we rely have reference to the clause in the Constitution which says that no tax or duty shall be levied upon exports and that this Court has been justified in overthrowing the subterfuges by which the effort has been made to tax exports, whether in the form of stamp taxes on bills of lading or in any other form, upon the ground that, there being no power to tax exports, they could not be taxed either directly or indirectly.

We maintain that in that respect there is absolutely no difference between that section of the Constitution and the one upon which we reply. The parapraphs begin with exactly the same word—"No". There is no "yes" in it; it is "no". "No tax or duty shall be laid on articles exported from any State"—"No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken." One is just as negative and prohibitive as the other. Congress has no more power to lay a direct tax without apportionment than it has to lay a tax upon exports.

Therefore our contention in brief is that if Congress has resorted to some subterfuge by which it has

laid a direct tax with apportionment that subterfuge should be swept aside in this case just as well as in any other case. It has been repeatedly affirmed by this Court that the same rules of construction apply to the grant, to the prohibition and to the limitations upon the power of taxation.

The points of our argument are found on pages 11, 12 and 13 of the brief for the plaintiff in error.

JUSTICE BROWN: Does not that argument go to the extent of nullifying the whole stamp tax system, practically?

MR. PAVEY: No, not the whole stamp tax system, if Your Honor please. I think that it is an inevitable consequence of the decision of the Court in the Income Tax Cases that many of the stamp duties which prior to that decision were never challenged and were perhaps regarded, if they were regarded at all, as excises will as a matter of consistency and logical deduction from that decision have to be declared unconstitutional whenever they come before this Court on the ground that they are direct taxes and unconstitutional unless they are apportioned. However I do not think that applies to all stamp duties. Your Honor asked a question yesterday in regard to the difference between a tax on a deed and a tax on a bank check and I will use that stamp tax as an illustration of the distinction between the two classes of stamp taxes in answer to your question.

When this War Revenue Law was passed it laid a tax of two cents upon each check. Now, no one has to use a check. The great majority of the people in the United States get along very comfortably and live without using checks. They do not have to have bank deposits. It is purely a matter of convenience in business to have them. It is purely a matter of convenience in business to draw on bank deposits by check. There are a great many banks that do not permit checks at all; I refer to many savings banks. There are many savings banks which allow no checking whatsoever. You must bring your book and have the amount that is paid to you entered on the book. If the book is lost or stolen payments made to the finder or to the thief and entered in the book are valid against the depositor. There are other savings banks which have both systems. They allow you to draw by check and they allow you to bring your book and have the amount paid entered in the book.

If we look at the precise moment when this War Revenue Law was passed imposing the stamp tax on checks there was no bank whatsoever that could have refused to pay its deposits unless a check was presented with a stamp on it. There is nothing to compel a man to furnish a check to a bank in order to draw out his money. Any depositor in any bank in this country could have gone to the bank whether he was in the habit of using the check system or not

and make a demand for his money. If refused he could have sued and recovered judgment for his money and costs.

Therefore it seems to me that the stamp duty upon a check is an entirely different thing from a stamp tax upon the sale of shares or certificates of stock and that difference is more marked for another reason. This law levying this tax on the sale of stock does not merely levy the tax upon the sale of certificates of stock. In fact the real tax is levied on the sale of *shares of stock* because the law provides that the tax shall apply to the sale of shares whether any certificate has ever been issued or not by the corporation in which the shares are held. It distinctly provides that the tax shall apply in either event. I do not wish to do very much reading during my argument but if the Court will permit me I will read the language of the act on that point: It says that this tax shall be laid on "all sales or agreements to sell or memoranda " of sales or deliveries or transfers of shares or cer- " tificates of stock in any association, company or " corporation, *whether made upon or shown by the* " *books of the association, company or corporation, or by* " *any assignment in blank, or by any delivery, or by* " *any paper or agreement or memorandum or other* " *evidence of transfer or sale whether entitling the* " *holder in any manner to the benefit of such stock,* " *or to secure the future payment of money or for the* " *future transfer of any stock, etc.*" Then it provides

that if the transfer is shown only by the books of the company the stamp must be placed upon the books. If it is made by a separate instrument the stamp must be placed on that instrument. If it is made by the delivery of a certificate assigned in blank a memorandum of sale must be made and the stamp must be placed on that memorandum.

In the case of Nicol vs. Ames[1] this Court held that the requirement of a memorandum was merely a convenient means of collecting the tax; that it was not an essential element of the law which might have required each man who made a sale to make a monthly statement and declare the amount of his sales and pay the tax on the basis of that monthly statement with or without a stamp.

We contend that this law is unconstitutional in substance upon one ground but in form upon two general grounds. One is probably a little technical. We have tried to follow a logical argument based purely and simply upon decisions of this and other courts. The other is based upon a broad principle. We maintain that this law itself, this tax itself, if there had never been any decisions of this Court on the subject violates the true spirit and purpose of the Constitution as defined and interpeted in the Income Tax Cases.

The technical argument which I make is that a tax upon property is a direct tax within the meaning

[1] Nicol vs. Ames, 173 U. S., 509-523.

of the Constitution;[2] that shares and certificates of stock are property;[3] that the right of sale is an inherent attribute of property at common law and is so recognized by the courts of all the States and by the Federal courts as well;[4] that a tax upon the sale of articles has been uniformly held by this Court to be in substance a tax on the article sold and that when Congress had not the power to tax the article sold it could not escape that prohibition by laying the tax upon the sale of the article.[5]

This principle and rule has been sustained by this Court in a number of cases, the leading cases being Brown vs. Maryland, Welton vs. Missouri, Cook vs. Pennsylvania, Almy vs. California, Nicol vs. Ames, and Fairbank vs. The United States. In his reply to our brief the Assistant Attorney-General who has prepared a very elaborate review of all these cases fell into the error of thinking that we cited these cases to show that the taxes laid in these cases

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[2] Pollock vs. Farmers' Loan & Trust Co., 157 U. S., 429, 583; 158 U. S., 601, 637. Constitution of the United States, Article 1, Section 2, Subdivision 3; Article 1, Section 9, Subdivision 2.

[3] Jellenik vs. Huron Copper Mining Co., 82 Fed. Rep., 778. Allen vs. Pegram, 16 Iowa, 163. Mattingly vs. Roach, 84 Cal., 207. Sargent vs. Franklin Ins. Co., 8 Pick., 90. Weaver vs. Barden, 49 N. Y., 286. 23 Am. & Eng. Enc. Law, 590. Cook on Corporations (4 Ed.), Vol. 1, p. 41.

[4] 1 Blackstone's Commentaries, 138. 2 Kent's Commentaries, 317, 320, 326. Bouvier's Law Dictionary—Property. Rutherford's Institutes, p. 20. Puffendorf's Laws of Nature, p. 220. Wynehamer vs. People, 13 N. Y., 396, 397. Sherman vs. Elder, 24 N. Y., 381. Toledo Bank vs. Bond, 1 Ohio St., 662. Exchange Bank of Columbus vs. Hines, 3 Ohio St., 8. Tod vs. Wick, 36 Ohio St., 385. Kuhn vs. Common Council, 70 Mich., 537. Arapahoe County vs. Printing Co., 15 Colo. App., 196. Commonwealth vs. Maury, 82 Va., 883. State vs. Kreutzberg, 114 Wis., 534. *In re* Marshall, 102 Fed. Rep., 324.

[5] Brown vs. Maryland, 12 Wheaton, 419, 444. Welton vs. Missouri, 91 U. S., 275, 279. Cook vs. Pennsylvania, 97 U. S., 566, 573. Almy vs. California, 24 How., 174. Nicol vs. Ames, 173 U. S., 509, 521. Fairbank vs United States, 181 U. S., 293.

were direct taxes. We cited them for no such purpose. We cited them solely and simply for the purpose of showing that this Court has rejected as a subterfuge every tax law which endeavored to tax through the medium of a sale that which it could not tax directly. Hence we maintain that this tax upon the sale of shares or certificates of stock is in substance a tax on the shares or certificates themselves and that therefore it is a tax upon personal property.

Formerly a distinction was drawn between shares of stock; some of the State courts holding that they partook of the character of the property of the corporation; that if the property of the corporation was real estate they were real estate and if the property of the corporation was personal property they were personal property. That distinction is no longer of any value because the general trend of opinion is that shares of stock are personal property. Whether that distinction exists or not the second Income Tax Case held that a tax upon personal property was a direct tax. We therefore maintain that this is a tax upon personal property; that it is a direct tax within the meaning of the second Income Tax Case; that it has not been apportioned among the States and that it is for that reason unconstitutional.

I will now refer to some of the points which the Assistant Attorney-General has made in reply to the argument in our brief.

In his brief on behalf of the Government he endeavors to draw a distinction as to what the second Income Tax Case meant which, I think, is entirely unwarranted either by that decision or by the subsequent interpretation which has been placed upon it. He points out the fact that from 1789 to 1896 only two taxes were clearly recognized by this Court as direct taxes; a capitation tax and a direct land tax. He then states that this Court in the Income Tax Cases defined three other direct taxes. The fourth and fifth—a tax on the income of real property and a tax on the income of personal property—do not concern us in this case. His third direct tax is defined as "a tax upon all one's personal estate by reason of one's general ownership thereof."

We maintain that the Assistant Attorney-General through a misunderstanding of certain expressions which have occured in the opinions of this Court has inserted the word *all* in that definition without any warrant or authority of law under the decisions of this Court. He bases his claim that the word *all* should be in the definition—in other words, that a direct tax must be a tax on *all* one's personal estate —upon—

JUSTICE HOLMES: What page is that?

MR. PAVEY: In the Attorney-General's brief pages 36 and 37 and in my reply brief pages 6 and 7.

He bases his claim upon quotations from the brief of Alexander Hamilton in the Carriage Tax

Case;[6] from the opinion delivered by Mr. Chief Justice FULLER in the second Income Tax Case;[7] and from the opinion delivered by Mr. Justice WHITE in Knowlton vs. Moore[8] in which he defined the scope of the decision in the second Income Tax Case.

The only one of his quotations which in any degree supports his claim is the quotation from the opinion of Alexander Hamilton which is quoted from Chief Justice FULLER'S opinion in the second Income Tax Case. That quotation from Hamilton was supposed to be taken from his brief in the Carriage Tax Case. Hamilton said:

"The following are presumed to be the only "direct taxes: capitation or poll taxes; taxes on "lands and buildings; general assessments whether "on the whole property of individuals or on their "whole real or personal estate. All else must of "necessity be considered as indirect taxes."

This Court expressed its opinion of that opinion of Hamilton's in that same Income Tax decision. It examined his writings when he was trying to induce the adoption of the Constitution and found that at that time he divided the power of taxation into *external* and *internal*, putting into the former the power of imposing duties on imported articles and into the latter all remaining powers; and divided the latter into *direct* and *indirect*, putting into the latter

[6] Hylton vs. United States, 3 Dallas, 171.
[7] Pollock vs. Farmers Loan & Trust Co., 158 U. S., 625-628.
[8] Knowlton vs. Moore, 178 U. S., 41-82.

duties and excises upon articles of consumption. The Court then said:

"It seems to us to inevitably follow that in Mr. "Hamilton's judgment at that time all internal taxes, "except duties and excises on articles of consump- "tion, fell into the category of direct taxes."[9]

Hamilton's comparative opinions as a statesman and an advocate were then analyzed by this Court in the following language:

"Any loose expression in definition of the word "'direct,' so far as conflicting with his well-considered "views in the Federalist, must be regarded as the "liberty which the advocate usually thinks himself "entitled to take with his subject."[10]

We maintain therefore that the quotation from Hamilton does not support the contention of the Assistant Attorney-General that a direct tax upon personal property must be levied upon all one's personal property or in other words that it must be a general assessment upon personal property.

The quotations from the opinions of this Court in the second Income Tax Case and in Knowlton vs. Moore do not warrant the Assistant Attorney-General in inserting the word "all" in his definition of a direct tax.

In the quotation from the opinion of this Court in Knowlton vs. Moore cited by the Assistant Attorney-

[9] Pollock vs. Farmers' Loan and Trust Co., 158 U. S., 624-625.

[10] Pollock vs. Farmers' Loan and Trust Co., 158 U. S., 624-625.

General the word "all" does not qualify the very correct definition given by the learned justice who delivered that opinion. That definition was a tax imposed upon a person "*solely because of his general ownership of personal property.*" The word "general" qualifies "ownership" and not "property." We contend that the tax in the case at bar is imposed on one's shares or certificates of stock "solely because of one's general ownership of such shares or certificates of stock."

Nor can the definition of the Assistant Attorney-General be accepted as a correct statement of the scope of the second Income Tax Case because the case stated in his definition was not before the Court in the Income Tax Case.

In the Income Tax Case the question before the Court was whether the tax upon the income from personal property was or was not a direct tax. No question was before the Court as to whether a tax on personal property must be "imposed upon all one's personal estate solely because of one's general ownership of such personal property" in order that it should be a direct tax. The Court in delivering its opinion in the second Income Tax Case in answer to the argument that a tax upon personal property was difficult or impossible of apportionment made use of the illustration that "all the real estate of the country and all its invested personal property are open to the direct operation of the taxing power if an

apportionment be made according to the Constitution" and added that "personal property of some kind is of general distribution, and so are incomes, though the taxable range thereof might be narrowed through large exemptions."[11] But nowhere in the opinion in the second Income Tax Case did the Court say that a tax on personal property must be levied on all the invested personal property of the country in order to become a direct tax. The Court placed no limitation on its decision that a tax upon personal property was a direct tax. The language of the Court is as follows:

"Our conclusions may therefore be summed up "as follows: * * *

"SECOND. We are of opinion that *taxes on per-* "*sonal property* or on the income of personal property "are likewise direct taxes."[12]

There is a further reason why this interpretation of the meaning of the decision of the second Income Tax Case can not be accepted as sound. If the Congress has power to levy without apportionment a tax upon some certain kinds of personal property and can escape the limitation of the Constitution unless it levies the tax "upon all one's personal estate by reason of one's general ownership thereof" it will practically have the power to levy an income tax upon the income derived from those certain kinds

[11] Pollock vs. Farmers' Loan and Trust Co., 158 U. S., 626.

[12] Pollock vs. Farmers' Loan and Trust Co., 158 U. S., 637.

of personal property. The law in question in the Income Tax Case did not levy a tax upon the income derived from all one's personal estate. The law was filled with exemptions both as to amount and as to source of income. It was a particular instance of a law drawn for the purpose of taxing incomes derived from certain sources of property and work and exempting incomes derived from certain other sources of property and work. This failure of Congress to levy the tax upon the incomes derived from "all one's personal estate" did not exempt the tax in question from the prohibition of the Constitution.

But if the qustion whether a tax upon personal property is a direct tax is to be determined by the test as to whether it is levied upon all one's personal estate the Income Tax decision can be practically nullified by Congress. It can tax certain kinds of personal property specified in the law and measure the tax by the amount of the income derived from that property. There will be no limit to the number of kinds of personal property upon which an unapportioned tax *measured by income* can be imposed so long as the tax is not imposed "upon all one's personal estate solely by reason of one's general ownership of such personal property." It cannot have been the deliberate intention of this Court to place an interpretation upon its decision in the second Income Tax Case which will open the door for such an absurd nullification of that decision.

After endeavoring in this way to limit the scope of the decision in the second Income Tax Case to a general assessment or tax upon all one's personal property the Assistant Attorney-General presents eight various theories which he suggests as hypotheses upon which this tax may be sustained as an indirect tax or a tax in the nature of a duty or excise. I will briefly state and make replies to these various theories.

His first theory is that the tax is an "indirect "tax within every definition of that term contained "in the decisions of this Court and the writings of "leading authors on the subject of political econ-"omy."

So far as the leading authors on political economy are concerned we do not think their definitions ever have or ever will aid this Court in determining what is or is not a direct tax under the Constitution. We shall touch upon that point later in this argument. If the tax here imposed is an indirect tax within the meaning of every definition of the term contained in the decisions of this Court that proposition is his case and the opposite proposition is our case. So that his first theory is a mere statement of the question at issue.

His second theory is that "the tax here imposed "is not a direct tax within the meaning of the Con-"stitution for the reason that it is impossible to ap-"portion it among the several States according to "population."

We maintain that there is no such thing as an impossibility to apportion any tax whatsoever among the States. It may result in absurd inequality. It may result in a tremendous tax being imposed on one State and none falling upon another State. But it is just as possible to apportion a tax upon the shares and certificates of stock among the States according to population as it is to apportion a tax upon land. There may be a resulting inequality in taxation or difficulty in collection but that inequality in taxation or difficulty in collection would not be much greater in the case of stock than in the case of land at the present time. However great they may be this inequality in taxation and difficulty in collection are no argument that the tax is not a direct tax. In fact that very inequality of taxation and difficulty of collection were contemplated and intended by the framers of the Constitution. That result was one of the safeguards created by the insertion in the Constitution of the rule of apportionment. That result will defeat the purpose of Congress in laying a direct tax without apportionment.

His third theory is that "the tax here imposed " may be sustained on the theory that it is a tax in " the nature of a duty or excise upon transactions in " business activity or forms of commercial dealing."

This theory is defended by the Assistant Attorney-General in the following language:

"It cannot be doubted that Congress has the

" power to declare that any person who shall engage " in the business or occupation of buying and selling " certificates of stock shall pay a tax measured by " the price realized."

We answer to this theory that an individual owner of shares or certificates of stock is taxed upon the sale of his own shares or certificates—if only one—if he never owned but one—whether he is or is not engaged in the "business or occupation of buying or selling certificates of stock." This Court has defined who are engaged in the business or occupation of buying and selling certificates of stock in the following language:

" A broker is defined to be one whose business it " is to negotiate purchases or sales of stocks, ex- " change, bullion, coined money, bank notes, promis- " sory notes, or other securities for himself or for " others. Ordinarily the term ' broker ' is applied to " one acting for others; but the part of the definition " which speaks of purchases and sales for himself is " equally important as that which speaks of sales " and purchases for others. All parts of the defini- " tion are qualified by the words ' whose business it " is.' Thus if A. B. has $10,000 which he desires to " invest and purchases United States stock or State " stock or any other securities he does not thereby " become a broker. Nor if he owns $10,000 of United " States stock which he wishes to sell to raise money " to pay his debts or because he is not satisfied with

" six per cent. interest, is he thereby made a broker. " It is only when making sales and purchases *is his* " *business, his trade, his profession, his means of* " *getting his living, or of making his fortune*, that " he becomes a broker within the meaning of the " statute." [13]

His fourth theory is that " the tax imposed is in " the nature of a duty or excise upon the contract of " sale itself, referring only to the fact that the subject- " matter of the sale must be a certificate of stock as " the basis or ground for classification."

Our answer to this theory is that this Court has repeatedly held that the effort to levy a tax upon sales is a mere subterfuge no matter in what form it is presented and that a tax upon sales is in substance a tax upon articles sold. The decisions of this Court in support of this assertion are cited in the brief of the plaintiff in error.

His fifth theory is that " the tax here imposed " may be sustained on the ground of its close analogy " to the tax involved in the case of Hylton vs. " United States." [14]

The tax in the Hylton case was sustained on the ground that it was a tax upon expense or consumption. The Assistant Attorney-General himself defines that tax in the following language:

" In the Hylton case the tax upon carriages was

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[13] Warren vs. Shook, 91 U. S., 704-710.

[14] Hylton vs. United States, 3 Dallas, 171.

" held to be an indirect tax in the nature of a duty " or excise levied upon the use of the carriage."

We do not think any one will maintain that the sale of a share of stock is an expense or the consumption of the share. Nor is this tax a tax upon the use of the share or certificate of stock unless the Assistant Attorney-General consents to contradict himself. In another portion of his brief he makes the point in favor of the validity of the tax that it is not a tax on the use of the shares or certificates of stock. On page 46 he says:

" The owner of the stock is entitled to the posses- " sion thereof for all time absolutely free from the " operation of this law. He likewise enjoys all the " rights incident to the ownership of such property " free from any tax."

Our contention is that the tax in question in the care at bar is not a tax upon the use of the shares or certificates of stock because the owner of the shares or certificates can use them and enjoy their dividends or other income. But when he comes to exercise one of the inherent attributes of property—the right of sale and transfer—he must pay a tax which in form is a tax upon the sale but in substance is a tax upon the shares or certificates themselves.

His sixth theory is that " the tax here imposed " may be sustained upon the theory that it is laid " upon the privilege or facility afforded the owner of " the stock under and by virtue of the laws of the

" State authorizing the formation of the corporation " to sell and dispose of his property in the form of a " certificate of stock."

This theory carries its fallacy on its face. The tax here imposed is not limited to a sale of the certificate of stock. It is not limited to the sale of the seller's property in the form of a certificate of stock. The law taxes the sale of *shares as well as certificates* of stock in a corporation. This duplication of language was undoubtedly used to prevent any evasion of the tax on a technicality. Corporations may be organized with shares of stock and not issue certificates of stock. Plainly it is the sale of shares upon which the tax is really laid whether any certificates of stock have been issued or not. The law provides for a tax on the sale of shares where the " transfer is shown only by the books of the company."

The theory that the tax is laid upon the privilege or facility afforded the owner of the stock under the corporation laws of the State to sell his shares is not tenable. That is a privilege which is not conferred on the owner by the corporation laws of any State. The privilege of *acquiring* shares in a corporation is conferred by the State laws but not the privilege of *selling* them.

I must concede that the privilege of creating a corporation is a privilege granted by the statute law of the States. In the preceding portion of Schedule

A of this law a tax is laid on the issue of certificates of stock. As a matter of argument I am willing to admit that a tax upon the issue of certificates of stock is a tax upon a privilege. But that is a very different thing from a tax upon the ownership of shares because you may organize a corporation without certificates of stock.

I am willing even to admit that the privilege of *acquiring shares* in a corporation may be a privilege upon which Congress could lay an excise tax without apportionment. But the privilege of selling shares after one has acquired them from the corporation is not a creature of the State law at all. I doubt if you could find in the corporation law of any State a distinct provision giving to the owner of shares the right by statute to sell his shares. Certainly a corporation law which had no such declaration would not be defective for its purpose. The owner of the shares would have the right to sell regardless of any such declaration. If there is any State law which has that declaration in it I think it is merely a declaratory statute and declares a right of sale which the owner of the shares would have if no such declaration were in the statute.

The corporation laws of the States confer the privilege of organizing a corporation and give the holders of the shares the right to manage and direct the business of the corporation with such liabilities, privileges and immunities as the charter and the law

provide. That privilege is what is known as the franchise of being a corporation. Once a corporation is organized in accordance with the laws of any State that franchise itself becomes property of the corporation. Like any other property it belongs to all the holders of the shares; but every holder's individual shares in the corporation and in its franchises or other property are his personal property. Once he has acquired them they are no longer a matter of privilege but a matter of right. He owns them in his own right just as he owns cattle or land. His rights to his shares as property are as fully protected by every constitutional guarantee for the protection of property either under the Federal Constitution or under the State constitutions as are his rights to land or any other property. *His right of sale and transfer is an inherent attribute of his property in his shares as well as in his other property.*

His seventh theory is that "a tax similar to the "tax here under discussion has been uniformly re- "garded by the legislative and executive departments "of the Government since its foundation as an in- "direct tax within the meaning of the Constitu- "tion."

I admit that that is true. The Assistant Attorney-General cites the fact that three such taxes have been laid by Congress without apportionment:

1. A tax on certain certificates of stock (1797).
2. A tax on certificates of stock (1862).

3. This tax on the sale or agreement to sell certificates of stock (1898).

The same facts existed and the same argument was made in the case of Fairbank vs. The United States. In three instances stamp taxes had been laid upon bills of lading for exports. They had never been challenged before but when they came before this Court in the case of Fairbank vs. The United States the Court properly said that in cases of doubt due consideration was to be given to the construction which had been placed upon the Constitution for so long a period of time by the legislative and executive branches of the Government but that that consideration could not override the clear meaning of the purpose and spirit of the Constitution.

The Assistant Attorney-General quotes from the opinion of the Court in the case of Fairbank vs. The United States to show that the Court will admit that actual construction to settle questions of doubt. I quote from the same opinion to show that although that actual construction had been applied by Congress to stamp taxes on export bills of lading this Court rejected the tax as an unconstitutional subterfuge:

"We have no disposition to belittle the signifi-
"cance of this matter. It is always entitled to care-
"ful consideration and in doubtful cases will, as we
"have shown, often turn the scale; but when the
"meaning and scope of a constitutional provision are
"clear it cannot be overthrown by legislative action,

" although several times repeated and never before " challenged. It will be perceived that these stamp " duties have been in force during only three periods: " First, from 1797 to 1802; second, from 1862 to 1872; " and, third, commencing with the recent statute of " 1898. It must be borne in mind also in respect to " this matter that during the first period exports were " limited, and the amount of the stamp duty was " small, and that during the second period we are " passing through the stress of a great civil war or " endeavoring to carry its enormous debt; so that it " is not strange that the legislative action in this re- " spect passed unchallenged. Indeed, it is only of " late years, when the burdens of taxation are increas- " ing by reason of the great expenses of government, " that the objects and modes of taxation have become " a matter of special scrutiny. But the delay in pre- " senting these questions is no excuse for not giving " them full consideration and determining them in " accordance with the true meaning of the Constitu- " tion."[15]

His eighth theory is that " an act of Congress " imposing a tax directly upon all shares or certifi- " cates of stock in all corporations and associations " would be constitutional. *A fortiori*, is a law con- " stitutional which merely taxes the sale or agree- " ment to sell such property."

This theory rests upon his interpretation of the

[15] Fairbank vs. United States, 181 U. S., 311-312.

scope of the decision in the second Income Tax Case to the effect that a direct tax upon personal property must be a general assessment on all one's personal property. We do not agree to that. We maintain that a tax levied upon a particular kind of personal property is a direct tax just as much as if it were levied upon all personal property. We do admit that if Congress may tax directly without apportionment all shares or certificates of stock in all corporations and associations a tax upon the sale or agreement to sell such property is constitutional. We contend that none of the decisions of this Court sustain the right of Congress to levy a tax directly without apportionment upon shares or certificates of stock or any other property except with reference to either its production or its consumption. In the language of this Court in the case of Patton vs. Brady[16] all such taxes upon certain kinds of property have "reference to their origin or their intended use."

With this reply to the points which the Assistant Attorney-General has made in his brief on behalf of the Government I wish to add a few words in regard to my views as to what the true interpretation of the Constitution in this matter should be aside from the technical authority of the cases we have cited.

Prior to 1896, prior to the consideration of the Income Tax Cases by this Court, it seemed to be conceded in the able opinions of this Court that the only

[16] Patton vs. Brady, 184 U. S., 608.

direct taxes within the meaning of the Constitution were land taxes and capitation taxes. In all these prior decisions great stress was laid upon two things—the opinions of political economists and of the statesmen of the Revolution and the actual construction placed on the Constitution by Congress in its tax legislation. When the Income Tax Cases came before this Court all these sources of information and opinion as to what a "direct tax" was within the meaning the Constitution were fully canvassed and considered. But another thing was done which had not been done before and that was to make a study to determine what the original purpose of that clause in the Constitution had been. Not what political economists thought was meant by the Constitution at that time, not what Adam Smith thought or what Hamilton thought—these were all taken into account—but the thing of value which the Court decided was the ultimate object to be accomplished by that provision in the Constitution.

I think it is a perfectly fair statement to say that at the time that clause was put in the Constitution the only two taxes that the framers of that Constitution had definitely in mind—the only two taxes that they were safeguarding—were a land tax and a capitation tax. And the reason for that was very simple.

At that stage in the development of our country all great wealth was found in three forms. Real estate was one form. Land was valuable. Land was

highly prized. Slaves were another form of property which in the aggregate as a particular class of property was of immense value. Commerce was the remaining chief source of wealth—commerce and business. The accumulated or invested personal property was small in value and amount and it was not, therefore, the subject of the same anxiety and care and thought which was bestowed on the three chief forms of wealth.

The framers of the Constitution disposed of these three forms of wealth in regard to taxation in the following way: They gave interstate and foreign commerce to the Federal Government. They imposed the restriction that no tax could be laid upon exports. They allowed Congress to lay import duties. They provided that no State could without the consent of Congress lay taxes on imports or exports. Thus in the matter of taxation foreign commerce and interstate commerce were given to the Federal Government. They gave to Congress taxes upon business, taxes upon occupation, taxes upon consumption, and, in the development of modern life, taxes upon privileges that are not of the character of property. The right was given to Congress to levy excises upon them while the same right was reserved to the States.

The framers of the Constitution had a long struggle over the other two questions—the question of land and the question of slaves. The great land-

holding States did not propose to agree to a system of government which would enable the small land-holding States to levy a tax upon their land unless it were done by the rule of apportionment according to representation.

The slave-holding States did not propose to agree to a form of government based upon a system of representation according to population which would enable a majority of representatives from States where there were no slaves to levy a tax upon slaves unless the tax were laid in proportion to representation.

A compronise had to be made and the compromise made was expressed in two forms—positive and negative. I think the language is significant and if the Court will allow me I will read the positive form which occurs first in the Constitution.

"Representatives and direct taxes shall be appor-
" tioned among the several States which may be
" included within this Union, according to their
" respective numbers."

" Their respective numbers " did not mean the whole population. " Their respective numbers " meant all the free men plus three-fifths of the slaves. That was the basis of representation and the basis of apportionment of direct taxes. If that clause had stood alone—and that was the clause which was first adopted—the subsequent negative was put in afterwards—we would have been confronted with the broad question that direct taxes must be apportioned

and would have had no aid from the Constitution to fix upon one or two direct taxes.

But later they put in the following clause for additional certainty on the question of slaves:

"No capitation or other direct tax shall be laid, "unless in proportion to the census or enumeration "hereinbefore directed to be taken." They thus specified one tax as a direct tax—"no capitation or other direct tax."

The reason for this negative clause is very simple. The status of slaves was a matter of triplicate character. For purposes of representation they were regarded as persons. For all other purposes they were regarded as property. In some of the States they were declared by statute to be real property. In others they were held to be personal property. Therefore there appeared a necessity for specifying that no capitation tax should be laid except in proportion to the census although the subject had been in a broad sense covered by the previous declaration that direct taxes must be apportioned according to respective numbers.

I have admitted that doubtless the only other tax which the framers of the Constitution had clearly in mind was a land tax but if that was the only other tax that they meant to cover why did they not say in this second clause: "No capitation or *land* tax shall be laid, unless in proportion to the census?" They left the door open because in their minds the door

was intended to be open. They probably regarded a tax upon slaves, even where they were held as personal property, as a direct tax and did not propose to have it laid without apportionment. But they left the door open.

Down to 1896—as I read the decisions of this Court—continual and exclusive attention was paid in framing those decisions to two things: the opinions of political economists and statemen as to the meaning of a "direct tax" and the construction that had been placed upon this clause in the Constitution by Congress. All the direct taxes laid by Congress had been laid upon land and slaves. No other direct tax had been laid prior to the income tax of 1894.

The political economists had confused the subject, according to my view, so far as the Constitution of the United States was concerned by efforts to arrive at a philosophical determination of the meaning of a "direct tax." I do not think that can be done. Some men entertain contrary opinions. So far as the Constitution was concerned this Court until the Income Tax Cases came before it had never directed its attention to what the purpose of that clause in the Constitution had been—what the great object intended to be accomplished was.

In the Income Tax Cases the Court did define that purpose, that great aim, that great object, very clearly.

In the opinion delivered by Mr. Chief Justice

FULLER in the first Income Tax Case this language was used:

"The States were about, for all national purposes "embraced in the Constitution, to become one, united "under the same sovereign authority, and governed "by the same laws. But as they still retained their "jurisdiction over all persons and things within their "territorial limits, except where surrendered to the "general government or restrained by the Constitu- "tion, they were careful to see to it that taxation and "representation should go together."

That is not limited. Taxation and representation should go together "so that the sovereignty reserved "should not be impaired, and that when Congress, "and especially the House of Representatives, where "it was specifically provided that all revenue bills "must originate, voted a tax upon property, it should "be with the consciousness and under the responsi- "bility, *that in so doing the tax so voted would pro- "portionately fall upon the immediate constituents of "those who imposed it.*" [17]

Mr. Justice FIELD expressed the same purpose in similar language:

"On the one hand, anything like oppression or "undue advantage of any one State over the others "would be prevented by the apportionment of the "direct taxes among the States according to their "representation, and, on the other hand, anything

[17] Pollock vs. Farmers' Loan & Trust Co., 157 U. S., 556.

" like oppression or hardship in the levying of duties,
" imposts and excises would be avoided by the pro-
" vision that they should be uniform throughout the
" United States. This compromise was essential to
" the continued union and harmony of the States.
" *It protected every State from being controlled in its*
" *taxation by the superior numbers of one or more*
" *other States.*" [18]

Later in the same decision this Court defines even more clearly and tersely the rule that should guide it in the determination of what are and what are not direct taxes within the meaning of the Constitution. The language is:

" Nothing can be clearer than that what the Con-
" stitution intended to guard against was the exercise
" by the General Government of the power of *directly*
" *taxing persons and property within any State through*
" *a majority made up from other States.*"

Then the Court continues:

" It is true that the effect of requiring direct taxes
" to be apportioned among the States in proportion to
" their population is necessarily that the amount
" of taxes on the individual taxpayer in a State hav-
" ing the taxable subject matter to a larger extent in
" proportion to its population than another State has,
" would be less than in such other State, but this
" inequality must be held to have been contemplated
" and was manifestly designed to operate to restrain

[18] Pollock vs. Farmers' Loan & Trust Co., 157 U. S., 587.

" the exercise of the power of direct taxation to extraor-
" dinary emergencies and to prevent an attack upon
" accumulated property by mere force of numbers."[19]

Down to 1896 the decisions of this Court had dwelt upon the fact that at the time of the adoption of the Constitution the only taxes that were contemplated by the framers of the Constitution in their use of the phrase "direct" were taxes upon land and slaves. With the passage of the income tax law of 1894 however a new problem was presented to this Court which compelled the further investigation of of the purpose and ultimate object of that clause in the Constitution.

I do not think it needs very much argument to sustain the proposition that you could never pass through Congress a law laying an income tax apportioned among the States. The States have arrived at the point where many States have people with very great incomes and many other States have the same number of people with very small incomes. If you apportioned that tax it would have exactly the effect of placing a heavy burden of taxation upon the States where the people have small incomes and a light burden of taxation upon the States where they have large incomes in proportion to the population which would make the tax on the large incomes very small. In other words there would result an inequality in taxation which would be in favor of the

[19] Pollock vs. Farmers' Loan & Trust Co., 158 U. S., 583.

rich States and against the poor States. Practically, no such law will ever be passed by Congress.

When the matter was presented to this Court the Court was compelled to come to the conclusion that it was exactly that sort of taxation that was intended to be hit by that clause in the Constitution. Most people at the time of the adoption of the Constitution were looking out for land or looking out for slaves and had not stopped to think about incomes because they had none or because those they had were so small and evenly distributed that their taxation made no practical difference. But the Constitution was drawn in broad language. It did not say: "No capitation or land tax" but said: "No capitation or other direct tax." Therefore this Court held that a tax upon personal property or upon the income of real property or upon the income of personal property was a direct tax within the meaning of the Constitution.

There again I draw attention to the fact that this Court might have held that a tax upon personal property was a direct tax even if the question as to a tax upon income had not been before it. The Court however did not permit a direct tax to be laid upon personal property by the subterfuge of a tax upon income. It held: First, that a tax upon real estate was a direct tax and that a tax upon the income of real estate being indistinguishable from a tax upon real estate was likewise a direct tax. Second, that a tax upon personal property (not all one's personal

property but a tax upon personal property) was a direct tax; and that a tax upon the income of personal property being indistinguishable from a tax upon personal property was a subterfuge for a tax upon personal property and was therefore a direct tax.

It seems to me that it will be most unfortunate if in the necessary process of distinguishing direct and indirect taxes—the lines of which travel very closely together—that decision is weakened in any respect by subsequent interpretation.

Let me suggest a possibility of the present and of the future. When the South looked out for its slaves it had not foreseen the fact that in time to come it would have a product, grown only in the South, of perhaps greater value than all the slaves—cotton. Does any one suppose that the representatives of the Southern States in the Constitutional Convention, if they could have foreseen that fifty years later (by reason of the invention of the cotton gin and other circumstances) they were going to have a product of great value—of so great importance that it came to be said that "cotton is king"—does any one suppose that they would have left the door open for a majority made up in Congress from the North, where there is no cotton, to levy a tax upon cotton? It is inconceivable, to my mind, that they should have left such a door open.

To bring that argument right home to this very case: if the representatives of the North could have

foreseen the development in a century of the great volume of wealth in the rich States of the North and the East represented by shares and certificates of stock would they have left the door open for a majority in Congress made up from States where there are very few shares and certificates of stock to lay a tax without apportionment upon their shares or certificates of stock? I cannot conceive that such a thing could have been intended or permitted by them.

We maintain, therefore, that a tax upon land is a direct tax; that a tax upon personal property is a direct tax—not a tax upon all personal property but upon any personal property; that a tax upon cotton would be a direct tax; that a tax upon shares and certificates of stock would be a direct tax; and that a tax on the sales of shares or certificates of stock is nothing but a subterfuge—a subterfuge which has been uniformly and frequently repudiated by this Court—and that therefore as a matter of logical deduction from the decision of this Court in the second Income Tax Case combined with these decisions which have maintained that a tax on sales is a subterfuge there can be no escape from the conclusion that a tax on the sale of shares or certificates of stock is a direct tax and must be apportioned among the States according to population. The tax laid by the War Revenue Law in this case was not so apportioned and is therefore unconstitutional and void.

I thank the Court for its attention.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

GEORGE C. THOMAS, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 43.

ROBERT A. CHESEBROUGH, PLAINTIFF IN error, v. THE UNITED STATES. } No. 152.

MEMORANDUM FILED BY THE SOLICITOR-GENERAL, UPON THE SUGGESTION OF THE COURT, RESPECTING MOTION ON BEHALF OF THE PLAINTIFFS IN ERROR TO REASSIGN SAID CASES.

These cases raise certain questions as to the validity of the war-revenue act of 1898, and especially the fundamental question whether the taxes imposed are direct or indirect. The case of the *Spreckels Sugar Refining Company* v. *Penrose A. McClain, Collector, etc.*, No. 103 of the present term, involves the same fundamental question. My suggestion to the court is that these cases may be heard at the same time, not as one case necessarily, but following each other, to the convenience of the court and counsel.

It seems that counsel for all parties agree that the respective cases may be conveniently heard during December next. If, therefore, the court shall grant the motion, in which the Government acquiesces, to reassign Nos. 43 and 152 to be heard on some date in December, I respectfully suggest that No. 103 should be specially assigned to follow those two cases. If the various counsel agree hereafter that all three cases, or two of them, shall be fully consolidated for hearing as one case, that matter will be brought to the attention of the court. It may be that counsel will agree on that course, and, so far as the Government is concerned, the time of one case will suffice.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

GEORGE C. THOMAS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

No. 43.

BRIEF ON BEHALF OF THE UNITED STATES.

MILTON D. PURDY,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

GEORGE C. THOMAS, PLAINTIFF in error,
v.
THE UNITED STATES.
} No. 43.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

On the 10th day of December, 1901, the plaintiff in error, George C. Thomas, was indicted by the Federal grand jury in the circuit court for the southern district of New York for violation of the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes."

The indictment charges that George C. Thomas, of the city and county of New York, on the 15th day of May, 1901, being a broker, doing business in said city and county, then and there sold to one T. D. Scoble 100 shares of Atchison preferred stock, for the sum of $9,262.50. And that at the time of said sale the said George C. Thomas made

and delivered a memorandum of said sale to the said Scoble, as follows:

Stamps. NEW YORK, *May 15, 1901.*
Sold to T. D. Scoble, by Geo. C. Thomas,
100 shares of Atchison preferred, at 92⅜ .. $9,262.50

The indictment further charges that it was then and there the duty of said Thomas, under the law, to affix to and upon said memorandum of sale the proper revenue stamps to denote the amount of tax due the Government of the United States at the time of said sale and delivery of said memorandum; and that said Thomas was then and there liable to pay such tax; and that said Thomas at the time of making said sale and the delivery of the memorandum therefor did unlawfully make and deliver the memorandum of sale to the said Scoble without having the proper stamps affixed thereto, with intent to evade the provisions of section 25, Schedule A, of the act of Congress above referred to. (Record, p. 3.)

On the 11th day of December, 1901, the defendant was arraigned, and interposed a demurrer to the indictment upon the ground that the facts alleged in the indictment did not constitute "an infringement of, or a crime against, the laws of the United States," for the reason that the portions of the act of Congress known as the war-revenue act of 1898, upon which the indictment was based, are unconstitutional and void, because they are in violation of the Constitution of the United States, and, more particularly, in violation of article 1, section

2, subdivision 3 thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers;" and of article 1, section 9, subdivision 4 thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." (Record, p. 4.)

On December 24, 1901, argument was had upon the demurrer interposed to the indictment, and on January 28, 1902, Judge Thomas, in a very elaborate opinion, rendered his decision overruling the demurrer. (Record, pp. 5 to 17, inclusive.) The case was tried on the 12th day of March, 1902, before a jury, and a verdict of guilty, as charged in the indictment, was rendered. The court thereupon sentenced the prisoner to pay a fine of $500 and stand committed until the same was paid or until he should be otherwise discharged according to law. (Record, p. 23.) An appeal was thereafter perfected, and the case is here on a writ of error.

QUESTION.

The question raised is the constitutionality of the provisions of the act of June 13, 1898 (30 Stat., 448), known as "the war-revenue act," which levied a tax on all sales, or agreements to sell, or memoranda of sales, or deliveries or transfers of shares or certificates of stock in any association, company, or corporation, whether made

upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money, or for the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents.

CONSTITUTIONAL PROVISIONS.

I.

The provision of the Constitution which gives Congress the power to tax.

The Congress shall have power—

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States. (Art. I, sec. 8, par. 1, Constitution.)

II.

Constitutional exceptions to the power of Congress to lay and collect taxes.

(*a*) Expressed exception:

No tax or duty shall be laid on articles exported from any State. (Art. I, sec. 9, par. 5, Constitution.)

(*b*) Implied exception:

The Constitution necessarily implies an exception to the power of Congress to tax the *means*, *instrumentalities*, and *agencies* of the various State governments.

> The general principle is that as the *means* and *instrumentalities* employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General Government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter. (*Ambrosini* v. *United States*, 187 U. S., 1, 7.)

The leading cases which hold that the General Government, and the government of the various States, do not have the power to tax the *means* and *instrumentalities* employed by such governments to to carry into operation the powers granted to them, respectively, are:

> *McCulloch* v. *Maryland*, 4 Wheat., 315.
> *Collector* v. *Day*, 11 Wall., 113.
> *Weston* v. *Charleston*, 2 Pet., 449.
> *Bank of Commerce* v. *New York City*, 2 Black., 620.
> *United States* v. *Railroad Company*, 17 Wall., 322–27.
> *Railroad Co.* v. *Peniston*, 18 Wall., 5.
> *Knowlton* v. *Moore*, 178 U. S., 41–59.

III.

The provisions of the Constitution which control Congress as to the manner in which they shall lay taxes, sometimes called "limitations" on the power of Congress to tax.

(a) *Rule of uniformity.*

* * * But all duties, imposts, and excises shall be uniform throughout the United States. (Art. I, sec. 8, par. 1, Constitution.)

(b) *Rule of apportionment.*

First. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. (Art. I, sec. 2, clause 3, Constitution.) (The Fourteenth Amendment modified this provision so that the whole number of persons in each State should be counted, excluding Indians not taxed.)

Second. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. (Art. I, sec. 9, par. 4, Constitution.)

THE LAW.

The following are the material portions of the act under consideration, the italics being mine:

Adhesive stamps.

SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, *there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock* and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, *the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.* (31 Stats., 940.)

SCHEDULE A.

Stamp taxes.

One. Bonds, debentures, or certificates of indebtedness issued after the first day of July, anno Domini eighteen hundred and ninety-eight, by any association, company, or corporation, on each hundred dollars of face value or fraction thereof, five cents, and on each original issue, whether on

organization or reorganization, of certificates of stock by any such association, company, or corporation, on each hundred dollars of face value or fraction thereof, five cents, *and on all sales or agreements to sell or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company, or corporation*, whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, *or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock*, or to secure the further payment of money, or for the future transfer of any stock, *on each hundred dollars of face value or fraction thereof, two cents:* Provided, that in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; *and in cases of an agreement to sell, or where the transfer is by delivery of the certificate assigned in blank, there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum or sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers.* And any person or persons liable to pay the tax as

herein provided, *or any one who acts in the matter as agent or broker for such person or persons, who shall make any such sale, or who shall in pursuance of any such sale deliver any such stock or evidence of the sale of any such stock, or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court.* (31 Stats., 942.)

REPEAL.

Section 7, of the act of April 12, 1902, entitled "An act to repeal war-revenue taxation, and for other purposes," provides as follows:

SEC. 7. That section four of said act of March second, nineteen hundred and one, and sections six, twelve, eighteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, Schedule A, Schedule B, sections twenty-seven, twenty-eight, and twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and all amendments of said sections and schedules be, and the same are hereby, repealed. (32 Stats., p. 96.)

ARGUMENT AND AUTHORITIES.

PART I.

PRELIMINARY POINTS APPLICABLE TO FEDERAL TAX LAWS GENERALLY.

I.

Where the constitutionality of a law is involved, every possible presumption is in favor of its validity, and this continues until the contrary is shown beyond a reasonable doubt.

"Every possible presumption," said Mr. Chief Justice Waite, speaking for the court in the *Sinking Fund cases* (99 U. S., 700, 718), "is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the Government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

In *Powell* v. *Penna.* (127 U. S., 678, 684) the court, speaking by Mr. Justice Harlan, quotes this language with approval, and cites also *Fletcher* v. *Peck* (6 Cranch, 87, 128); *Dartmouth College* v. *Woodward* (4 Wheat., 518, 625); *Livingston* v. *Darlington* (101 U. S., 407); *Ogden* v. *Saunders* (12 Wheat., 213).

In the case of *Nicol* v. *Ames* (173 U. S., 514), Mr. Justice Peckham, in delivering the opinion of the court, said:

> It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has

frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or unadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare. The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. *It is not only the power to destroy, but it is also the power to keep alive.*

II.

The Constitution expressly confers upon Congress the taxing power.

The power which Congress exercised in levying the tax now before the court is found in section 8, of Article I, of the Constitution, which reads:

> The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States. * * *

This very comprehensive and almost absolute grant of power to Congress to tax is subject to the following exceptions and limitations.

(1). *Constitutional exceptions.*

(*a*) Expressed. "No tax or duty shall be laid on articles exported from any State." (Art. I, sec. 9, par. 5. *Fairbanks* v. *United States*, 181 U. S., 293.)

(*b*) Implied. "Congress has no power to tax the means and instrumentalities of the governments of the various States of the Union." (*Collector* v. *Day*, 11 Wall.)

(2) *Constitutional limitations upon the manner in which Congress may lay the tax.*

(*a*) *Rule of uniformity.* "* * * but all duties, imposts, and excises shall be uniform throughout the United States." (Art. I, sec. 8, par. 1. *Knowlton* v. *Moore*, 178 U. S., 41–83 et seq.)

(*b*) *Rule of apportionment.*

First. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. (Art. I, sec. 2, clause 3, Constitution.) (The fourteenth amendment modified this provision so that the whole number of persons in each State should be counted, excluding Indians not taxed.)

Second. No capitation or other direct tax shall be laid unless in proportion to the

census or enumeration hereinbefore directed to be taken. (Art. I, sec. 9, par. 4, Constitution.)

Hylton v. *United States*, 3 Dal., 171–177.

Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S., 429.

Pollock v. *Farmers' Loan and Trust Co.*, 158 U. S., 601.

III.

Congress may make all laws which shall be necessary and proper for carrying into execution the foregoing power.

Under the last clause of section 8 of Article I of the Constitution, Congress is given the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc. Thus Congress has power to do whatever is necessary, or seems to it necessary, to carry into effect an express power.

In the great case of *McCulloch* v. *Maryland* (4 Wheaton, 316, 421) Mr. Chief Justice Marshall laid down the rule, which has been followed ever since:

> The sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the Constitution, and all*

means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

IV.

The selection of the means rests with Congress. Unless these means are forbidden by the Constitution, the courts will not interfere.

In the case of *McCulloch* v. *Maryland*, already cited, Mr. Chief Justice Marshall said (p. 423):

> *Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power.*

This language was quoted with approval by Mr. Justice Gray, speaking for the court in the recent case *Fong Yue Ting* v. *United States* (149 U. S., 698, 712), and also by Mr. Justice Harlan, who delivered the opinion of the court in the later case of the *Interstate Commerce Commission* v. *Brimson* (154 U. S., 447, 472), with the following additional language (p. 473):

> It is a settled principle of constitutional law that "the Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be

allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." (4 Wheat., 316, 409.) The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It can not go beyond that inquiry without entrenching upon the domain of another department of the Government. That it may not do with safety to our institutions. (*Sinking fund cases*, 99 U. S., 700, 718.)

V.

With the two exceptions and under the limitations of the Constitution heretofore pointed out, the taxing power of Congress reaches all kinds and descriptions of property and all rights and privileges incident thereto.

The power to tax is an essential attribute of sovereignty. Without revenue, no government can exist. Within the limitations fixed by the Constitution, the mode of exercising the taxing power is within the discretion of Congress. The breadth of the taxing power under our Constitution is well described by Mr. Chief Justice Chase,

speaking for the court, in the *License tax cases* (5 Wall., 462, 471):

> The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.

And again by Mr. Justice Swayne, speaking for the court, in *Pacific Insurance Co.* v. *Soule* (7 Wall., 433), page 443:

> Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Government.

Speaking of the character and extent of the power of taxation in the States, this court, Mr. Justice Field delivering the opinion, said in the case of the *State tax on foreign-held bonds* (15 Wall., 300, 319):

> The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects

> are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape—in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted—in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction.

And Mr. Justice White, in the case of *Knowlton* v. *Moore* (178 U. S., 41, 59), has this to say as to this plenary power of Congress to tax.

> *Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership are subject more or less to State regulation, exclusive in its nature.* If the proposition here contended for be sound, such property or dealings in relation thereto can not be taxed by Congress, even in the form of a stamp duty. It can not be doubted that the argument

when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them.

VI.

In exercising the taxing power Congress may, through classification, select the subjects of taxation, and thus use its discretion in distributing equitably the burdens of government.

Within the limits fixed by the Constitution Congress may use its discretion in selecting the subjects of taxation and distributing the burdens of government. The greater part of legislation is special; that is, Congress, in dealing with matters before it, exercises the right of classification. The decisions of this court recognize in the fullest and clearest way the right to classify.

In the recent case of *Magoun* v. *Illinois Trust and Savings Bank* (170 U. S., 283), where the inheritance-tax law of Illinois was assailed on the ground that there was an arbitrary and unconstitutional classification, Mr. Justice McKenna, speaking for the court, discusses elaborately the decisions upon the subject of classification, reaching the conclusion that the provision of the Illinois law levying a graduated tax upon inheritances, and for that purpose dividing them into classes according to

the value thereof, was not unconstitutional. He concludes with this language (bottom p. 300):

> That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary, because it is determined by that value; it is not unequal in operation, because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality, nevertheless they are universally imposed and their legality has never been questioned.

As to the power of Congress, through classification, to select subjects of taxation, Mr. Justice Peckham, in the case of *Nicol* v. *Ames* (173 U. S., 509, 521), says:

> The question always is, when a classification is made, whether there is any reasonable ground for it or whether it is only and

simply arbitrary, based upon no real distinction and entirely unnatural. If the classification be proper and legal, then there is the requisite uniformity in that respect.

To the same effect see the following cases:

Gulf Railroad, etc., Ry. v. *Ellis*, 165 U. S., 150.

Barbier v. *Connolly*, 113 U. S., 31.

Bell's Gap R. R. Co. v. *Pennsylvania*, 134 U. S., 232, 234.

Home Insurance Co. v. *New York*, 134 U. S., 594.

Pacific Express Company v. *Seibert*, 142 U. S., 339.

Railroad Company v. *Gibbs*, 142 U. S., 386.

Missouri Pacific R. R. Co. v. *Humes*, 115 U. S., 512.

Missouri Ry. Co. v. *Mackey*, 127 U. S., 205.

Kentucky Railroad Tax Cases, 115 U. S., 321.

Missouri v. *Lewis*, 101 U. S., 22, 30.

Horn Silver Mining Co. v. *New York*, 143 U. S., 305.

Munn v. *Illinois*, 94 U. S., 113.

Budd v. *New York*, 143 U. S., 517.

Soonhing v. *Crowley*, 113 U. S., 703.

Wurtz v. *Hoagland*, 114 U. S., 606.

Watson v. *Nevin*, 128 U. S., 578.

Minneapolis v. *Beckwith*, 129 U. S., 26.

C. & N. W. Ry. Co. v. *McLaughlin*, 119 U. S., 566.

Hayes v. *Missouri*, 120 U. S., 68.

Dow v. *Beidelman*, 125 U. S., 680.

VII.

The constitutionality of a law making an exaction for purposes of revenue depends upon its operation and effect, and not upon the form it may be made to assume.

In determining whether a taxing law is constitutional or not, it is first necessary to ascertain its operation and effect in the light of the entire act. The form of the act is not the essential thing. In construing a tax law, the court will keep in view the reason of the law, and give the law a construction which will comport with the intention of the enacting power.

Thus, in the *License Tax cases* (5 Wall., 462), it was conceded that Congress could not grant a license to traffic in liquor within the States, because such authority is vested in the States; yet the Federal law in words provided for the issuance of a license, and made it a misdemeanor to engage in the liquor business without first paying the special tax and obtaining a license. This court upheld the law upon the ground that, though the statute called it a license, it was in effect and operation a tax which Congress had the right to levy upon the liquor business.

PART II.

Constitutional provisions which expressly and by necessary implication absolutely exclude articles of export, and the agencies and instrumentalities of the various State governments from the domain of Federal taxation.

The absolute and unlimited power to tax is inherent in every sovereignty. The people of the United States must, therefore, possess this absolute power of taxation without exception or qualification. In adopting the Constitution, however, the people of the United States delegated to the General Government this power to tax *subject to certain exceptions and limitations*. The clause of the Constitution granting this power to the Federal Government is as follows:

> Congress shall have power: To lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States. (Art. I, sec. 8, par. 1, Constitution.)

CONSTITUTIONAL LIMITATIONS ON THE PURPOSE OF THE TAX.

It is apparent from this express grant of power to tax that certain limitations or restrictions were imposed upon the *purpose* for which taxes could be laid and collected, and which are as follows:

1. *To pay the debts of the United States;* 2. *To provide for the common defense of the United States;* and, 3. *To provide for the general welfare of the United States.*

Story on Constitution, vol. 1, secs. 907, 926.

7 Jefferson's Works, p. 757.

Tucker on the Constitution, sec. 222.

Judson on Taxation (1903), sec. 480.

These limitations as to the *purpose* for which a tax may be constitutionally laid and collected are so general and far reaching in their nature as to practically amount to *no limitation*.

CONSTITUTIONAL EXCEPTIONS WHICH *EXCLUDE* CERTAIN SUBJECTS FROM THE DOMAIN OF FEDERAL TAXATION.

1. *Express provision:*

No tax or duty shall be laid on articles exported from any State. (Art. I, sec. 9, par. 5, Constitution).

Illustrative case: *Fairbanks* v. *United States* (181 U. S., 283).

This case clearly illustrates how absolute is this express provision of the Constitution in prohibiting Congress from even *indirectly* invading this domain of articles exported from any State, which domain the Constitution says shall be excluded from taxation. Congress is permitted to come to the line, but can go no further. Congress can not, under the decision in this case, even impose a stamp tax on a bill of lading of goods exported from any State.

2. *Implied exception.*

The General Government is prohibited from taxing the means, instrumentalities, and agencies of the governments of the several States.

Illustrative case, *Collector* v. *Day* (11 Wall., 113):

> It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that Government. (*Collector* v. *Day*, *supra*, p. 127.)

See also:

Lane County v. *Oregon*, 7 Wall., 71–77.

Veazie Bank v. *Fenno*, 8 Wall., 533–537.

National Bank v. *Commonwealth*, 9 Wall., 353–362.

United States v. *Railway Company*, 17 Wall., 322–327.

Railway Company v. *Penniston*, 18 Wall., 5–36.

California v. *Central Pacific Ry. Co.*, 127 U. S., 1, 40.

Knowlton v. *Moore*, 178 U. S., 41–59.

(In view of the fact that the Constitution contains certain other limitations having sole and exclusive reference to the exercise of the power of taxation by the several States, and that confusion might easily arise from an attempt to make use of the cases of this court wherein such limitations were

alone considered, as authorities applicable to the case at bar, I have taken the liberty to insert a classification of such limitations, and the cases bearing thereon, in an appendix to this brief, marked "A.")

This law purports to levy a tax upon the sale or transfer of any share or certificate of stock in any corporation, association, or company. It is, therefore, quite apparent that the law in no way comes in conflict with the provision of the Constitution which declares that no tax or duty shall be laid on articles exported from any State.

It therefore becomes necessary to examine this law in connection with this implied prohibition of the Constitution to ascertain, if possible, if the law in effect taxes, either *directly or indirectly*, a means or instrumentality of any State government.

It is true that the law purports to tax *the sale of a certificate of stock* in a corporation. A corporation is an artificial person created and existing under and by virtue of the laws of one of the States of the Union, and by virtue of various State laws pertaining to corporations the stockholders or members of the corporation become clothed with certain rights, privileges, and duties with reference to their property or interest in such corporation. It is therefore apparent that at this point the law under discussion approaches the domain of taxation into which Congress has been forbidden to enter. But, fortunately, we are not compelled to indulge in any speculation as to what

means, instrumentalities, and agencies of a State government are exempt from Federal taxation, and what rights and privileges a State government may confer upon its citizens, subject to the taxing power of the General Government.

One of the first cases wherein this subject received consideration at the hands of this court is that of *Veazie Bank* v. *Fenno* (8 Wall., 533, 547), in which Mr. Chief Justice Chase said:

> Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?
>
> We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it can not be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property, and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.
>
> But in the case before us the object of taxation is not the franchise of the bank, but property created or contracts made and

> issued under the franchise or power to issue bank bills. A railroad company in the exercise of its corporate franchises issues freight receipts, bills of lading, and passenger tickets; and it can not be doubted that the organization of railroads is quite as important to the State as the organization of banks. *But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress and not exempted by any relation to the State which granted the charter of the railroad.* And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them, and both, as we think, may properly be made contributory to the public revenue.

This case clearly illustrates that there are many rights and privileges which may be created by virtue of the laws of the various States, and conferred upon the citizens of such States, which are, nevertheless, proper subjects of taxation by the Federal Government for the reason that such rights and privileges are not necessary agencies or instrumentalities for the legitimate purposes of State government.

This case was very shortly followed by the decision of the case of *Collector* v. *Day* (11 Wall., 113), wherein it was clearly pointed out precisely what means and instrumentalities of a State government Congress is forbidden to tax under this implied

power in the Constitution. In that case the court said (p. 126):

> We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the General Government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent power never parted with, and, in respect to which, the supremacy of that Government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the General Government stand upon as solid a ground, and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in *Dobbins* v. *The Commissioners of Erie* from taxation by the State; for, in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the General Government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the

States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to the *Veazie Bank* v. *Fenno* (8 Wall., 533), in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCullock* v. *Maryland*, namely, "That the power to tax involves the power to destroy."

The power involved was one which had been exercised by the States since the foundation of the Government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the General Government, just as the judicial office in the present case might

> be, if subject at all to taxation by that Government. But notwithstanding the sanction of this taxation by a majority of the court, it is conceded in the opinion that "the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government are not proper subjects of the taxing power of Congress." This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain. (*Collector* v. *Day*, 11 Wall., 113, 126.)

From a consideration of these two cases we see very clearly that the line of demarcation has been sharply drawn between the rights and privileges which a State may create and confer upon its citizens for their peculiar and special benefit, but which are, nevertheless, subject to Federal taxation, and those governmental agencies and instrumentalities which must of necessity be free from Federal control or influence in order to give effect to State laws through proper executive action.

Without attempting to follow the various decisions of this court rendered since the decision of the two cases above reviewed, and which have contributed, more or less, to make the line of separation more clear and well defined, it is apparent that the law with which we are at present concerned, and which professes to affect only indirectly

the shares of stock in a private corporation, has not invaded or attempted to invade the forbidden realm of taxation which has been so zealously and carefully guarded by the decisions of this court.

We will therefore conclude this discussion by quoting the language of Mr. Justice White in delivering the opinion of the court in the case of *Knowlton* v. *Moore* (178 U. S., 41–59):

> In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the Government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct, and many acknowledged objects of indirect, taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State can not be taxed because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the

several States because Congress may regulate interstate commerce? *Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership are subject more or less to State regulation, exclusive in its nature.* If the proposition here contended for be sound, such property or dealings in relation thereto can not be taxed by Congress, even in the form of a stamp duty. It can not be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them.

PART III.

Constitutional limitations upon the manner in which the Congress may impose any particular tax.

Having already demónstrated that the provision of the war revenue act of 1898 here under consideration is not violative of either of the prohibitory clauses of the Constitution, the one express and the other implied, heretofore considered, it necessarily follows that the Constitutional power of Congress to impose the tax is no longer open to question. There remains, however, a further subject of inquiry, which is as to the *manner* in which Congress is required by the Constitution to lay every tax which even it has the undoubted right to impose.

We have seen that with the exception of exports, and the means and instrumentalities of the various States, that the Constitutional power of Congress to tax is practically absolute. But overspreading this vast and almost absolute realm of taxation, wherein the taxing power of Congress reaches all persons, property, and privileges of whatever description, including the various relations, rights, and incidents of the individual citizen with respect to property, we find imposed two very important Constitutional limitations upon Congress which control and regulate its action as to the manner in which it may exercise this great power.

CONSTITUTIONAL LIMITATIONS UPON THE MANNER IN WHICH CONGRESS MAY EXERCISE THE TAXING POWER.

1. *Rule of apportionment.*

(*a*) Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers. * * * (Art. 1, sec. 1, par. 3, Constitution.)

(*b*) No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. (Art. 1, sec. 9, par. 4, Constitution.)

2. *Rule of uniformity.*

* * * but all duties, imposts, and excises shall be uniform throughout the United States. (Art. 1, sec. 8, par. 1, Constitution.)

Whatever may be the precise meaning of the phrase "direct tax" as understood and used by various writers on the subject of political economy, it is only necessary to an intelligent discussion of the validity of the law under consideration to ascertain and determine what is understood by the phrase "direct tax" *within the meaning of the Constitution*.

As Mr. Justice Peckham said, in delivering the opinion of the court in the case of *Nicol* v. *Ames* (173 U. S., 509, 515):

> The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede, or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.
>
> In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scien-

tific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.

DIRECT TAXES.

The following are the only direct taxes, within the meaning of the Constitution, which have been decided to be such by the opinions of this court:

(1789-1896.)

1. A capitation or poll tax.

The Constitution in express terms regards a capitation or poll tax as a direct tax.

> No *capitation* or other direct tax shall be laid, etc. (Art. 1, sec. 9, par. 4, Constitution.)

2. A tax on lands (that is, a *direct* tax on lands such as is ordinarily imposed).

Hylton v. *United States*, 3 Dallas, 171.
Pacific Insurance Co. v. *Soule*, 7 Wall., 433.
Veazie Bank v. *Fenno*, 8 Wall., 533.
National Bank v. *United States*, 101 U. S., 1.
Scholey v. *Rew*, 23 Wall., 331.
Railroad Company v. *Collector*, 100 U. S., 595.
Springer v. *United States*, 102 U. S., 586.

(1896 TO THE PRESENT DATE.)

3. A tax upon all one's personal estate by reason of one's general ownership thereof. (*Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 601.)

4. A tax on the income of real property. (*Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 601; *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429.)

5. A tax upon the income of personal property. (*Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 601.)

TRUE SCOPE OF THE SECOND INCOME-TAX CASE.

We maintain that the true scope of the second income-tax case, in so far as it holds that a tax on personal property is a direct tax within the meaning of the Constitution, refers simply to a tax imposed upon *all one's personal estate solely* because of *one's general ownership of* such personal property, and that this is apparent, not only from the decision itself, but from subsequent decisions

of this court wherein the real meaning of that case in this particular was adverted to and made clear.

(*a*) *From the case itself.*

Mr. Chief Justice Fuller, in delivering the opinion of the court, on page 625, quoted the following from the writings of Alexander Hamilton:

> The following are presumed to be the only direct taxes, capitation, or poll taxes: Taxes on lands and buildings; general assessments whether on the whole property of individuals or on their whole real or personal estate. All else must of necessity be considered as indirect taxes.

In commenting upon the above definition of direct taxes, the Chief Justice says:

> He gives, however, it appears to us, a a definition which covers the question before us. A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax in the meaning of the Constitution.

And again, page 628, he says:

> Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income, or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The

> Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax can not be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed."
>
> Personal property of *some kind* is of *general distribution*, and so are incomes, though the taxable range thereof might be narrowed through large exemptions.

And, in conclusion, on page 637, the Chief Justice clearly pointed out that *all* of one's personal estate was the question which the court considered, and upon which its conclusion was based, that a tax on personal property is a direct tax. He says:

> We do not mean to say that an act laying by apportionment a direct tax on *all real estate and personal property*, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations.

(*b*) *From the subsequent decisions of this court.*

In the case of *Knowlton* v. *Moore* (178 U. S., 41, 82) Mr. Justice White, in delivering the opinion of the court, had the following to say with reference to the true meaning of the income-tax cases:

It is true that in the income-tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. *The constitutional meaning of the word direct was the matter decided.* Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons *solely because of their general ownership of property* from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person *solely because of his general ownership of real property* and the same tax imposed *solely because of his general ownership of personal property;* secondly, that the tax on the income derived from *such property*, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts, and excises which are not the essential equivalent of a tax on *property generally, real or personal, solely because of its ownership*, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall.

I think that no one would contend that the law now under consideration imposing a tax upon the sale or transfer of a certificate of stock falls within the meaning of a *capitation tax* or a *tax upon real estate;* nor would anyone contend that this law in any manner seeks to impose a tax upon an *income from real estate* or upon an *income from personal property*. There remains, therefore, but one class of taxation to be considered which has been adjudged by this court to be a direct tax, namely, *a tax levied upon one's personal property generally on account of one's general ownership thereof*. Can it be maintained that this law comes within that classification? The law here under discussion imposes a tax upon the sale or transfer of a certificate or share of stock of any corporation. Such a tax is clearly distinguishable from a tax imposed upon personal property on account of one's *general ownership*, as defined in the income tax cases.

Admitting, however, arguendo, as assumed by counsel for the plaintiff in error, that a law imposing a tax upon a sale or agreement to sell a certificate of stock *is a tax upon personal property*, the income tax cases are certainly no authority for asserting that such a tax must be regarded as *a direct tax* upon personal property within the meaning of the Constitution. A tax upon a certificate of stock in a corporation, even though directly imposed upon such certificate instead of being imposed upon the incident of sale, requires no argument to demonstrate that it is not a tax

upon *all* one's personal estate levied *solely* on account of one's *general ownership* thereof. The income tax cases, therefore, have no application to the case at bar. A tax, even if imposed directly on a certificate or share of stock, would manifestly affect specific or particular kinds of personal property, and, as an inevitable result, would be subject to the difficulty, if not the impossibility, attending its apportionment. Such difficulty, as was clearly pointed out in the income tax cases, is in a great measure avoided when all the personal estate is the object or thing taxed, for personal property of some kind is of general distribution throughout the country similarly if not equally with lands.

(For various definitions of the word taxes and the popular theory of taxation in the United States, see Appendix B.)

PART IV.

We have thus far shown that a tax imposed upon the sale of a certificate of stock does not fall within any of those domains of taxation excluded from the operation of the taxing power of Congress by express provision of the Constitution, and the necessary implication contained in that instrument; we have likewise demonstrated that such a tax does not fall within any of the five classes of direct taxation which have, up to the present time, been adjudged by this court, to be subjects of direct taxation within the meaning of that instrument.

Let us consider, then, whether this law presents a new and heretofore undiscovered species of taxation which, when critically examined, must be regarded as a direct tax within the meaning of the Constitution, or whether the tax imposed by this law is an indirect tax, or a tax in the nature of a duty or excise.

That the law under discussion imposes a tax there can be no doubt, and as all taxes are either direct or indirect, if it be established that the tax here imposed is not a direct tax, it necessarily follows that it must be an indirect tax. And, inasmuch as all duties, imposts, and excises are indirect taxes, it is manifestly immaterial whether this tax be determined to be an indirect tax or a tax in the nature of a duty or excise. As to whether it must be determined to be *a tax* in the nature of *a duty or excise* in order to be considered *an indirect tax* is a question concerning which there may be some doubt.

In the case of *Hylton* v. *United States*, Mr. Justice Chase intimated that there may be a species of taxes other than direct, and at the same time not included within the words "duties, imposts, and excises." He says:

> If there are any other species of taxes that are not direct and not included within the words "duties, imposts, or excises," they may be laid by the rule of uniformity or not, as Congress shall think proper and reasonable. If the framers of the Constitution

> did not contemplate other taxes than direct taxes and duties, imposts, and excises, there is great inaccuracy in their language. If these four species of taxes were all that were meditated, the general power to lay taxes was unnecessary.

But Mr. Chief Justice Fuller, in delivering the opinion of the court in the *First Income Tax Case* (157 U. S., 557), very strongly intimated that in order that a particular tax may be regarded as an indirect tax it must be included within the words duties, imposts, and excises. He said:

> And although there have been from time to time intimations that there might be some tax which was not a direct tax, nor included under the words duties, imposts, and excises, such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.

And while, in view of this language, it may be necessary for the Government to show that the tax here imposed is a tax in the nature of a duty or excise, our contention is that the meaning of these words have been gradually enlarged by judicial interpretation so as to include every tax which is indirect in its character. It is, therefore, immaterial in the discussion of this case whether the tax upon the sale of a certificate of stock be regarded as an indirect tax, pure and simple, or

whether it be included under the words duties, imposts, and excises. We will, therefore, endeavor to point out several reasons for holding the tax here under discussion to be *an indirect tax*, or *a tax in the nature of a duty or excise* within the meaning of the Constitution.

(See Appendix "C" for various definitions of the terms "duties" and "excises" and the gradual enlargement of their meaning.)

VARIOUS THEORIES UPON WHICH THE LAW MAY BE SUSTAINED AS IMPOSING AN INDIRECT TAX, OR A TAX IN THE NATURE OF A DUTY OR EXCISE.

A.

The tax here imposed is an indirect tax within every difinition of that term contained in the many decisions of this court, and the writings of leading authors on the subject of political economy.

1. Accepted definitions of direct and indirect taxes, as shown by the opinions of this court.

In *Knowlton* v. *Moore* (178 U. S., 47), Mr. Justice White adopted the following definition:

> Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange.

Mr. Chief Justice Fuller, in the first income-tax case, says (157 U. S., 558):

> Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered

> indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which can not be avoided, are direct taxes. Nevertheless, it may be admitted that although this definition of direct taxes is prima facie correct, and to be applied in the consideration of the question before us, yet that the Constitution may bear a different meaning, and that such different meaning must be recognized.

Mr. Chief Justice Chase, in *Veazie Bank* v. *Fenno* (8 Wall., 546), gives the following definition:

> And it may further be taken as established, on the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.

(See Appendix "D" for further definitions of direct and indirect taxes, which have received the approval of this court.)

Definition of direct and indirect taxes by Dr. David A. Wells, in his "Theory and Practice of Taxation," page 341:

> In a general sense the term *direct* is applied to those taxes which are demanded from the particular persons who it is intended or desired shall pay them, and *indirect* to those which are demanded from a person with the expectation and intention

that he shall indemnify himself for payment of the same at the expense of some other person. There is, furthermore, marked distinction, founded on sound philosophy, between a direct and indirect tax, which, if concisely expressed, will constitute two unimpeachable definitions. Thus an indirect tax, whoever may first advance it, is paid voluntarily and primarily (in the sense of ultimately) by the consumer of the taxed article. On the other hand, *a direct tax has always in it an element of compulsion*—not necessarily on the person who advances the tax in block, but on the person who is compelled to use or consume the taxed property or its product.

(For definitions of other writers on political economy see Appendix D.)

Tested by these definitions, it is very clear that the tax imposed by this law is indirect in its nature. A tax upon the sale of a certificate of stock can not be said to bear immediately upon the persons or parties to such transaction, nor upon the possession and enjoyment of their rights. The owner of the stock is entitled to the possession thereof for all time absolutely free from the operation of this law. He likewise enjoys all the rights incident to the ownership of such property free from any tax. It is only upon the happening of an event or an exchange, to wit, the sale of the certificate of stock, that the tax attaches, and in such event the law simply imposes a tax upon the sale or agreement to sell, and either the seller or the

buyer may pay the tax wholly or in part, and the property, to wit, the certificate of stock, passes unaffected. Consider the facts in this very case in which the tax was not paid by the plaintiff in error, George C. Thomas. Is there any question but that the 100 shares of Atchison preferred stock passed from George C. Thomas to T. D. Scobel at the city of New York on the 15th day of May, 1901, unaffected by this law? It is true that the plaintiff in error made himself liable to indictment and punishment for failing to obey the requirement of the law. Nevertheless, the property, to wit, the shares of stock, passed unaffected by the law, according to the terms of the sale, from the plaintiff in error to the party to whom they were sold.

From this one circumstance it is apparent that there is a sound distinction between a tax of this character and the direct tax which we have heretofore considered. A capitation tax is levied upon a person, and if not paid the individual is ordinarily required to perform certain services for the State in lieu thereof. A direct tax on lands, if not paid, operates as a lien upon the thing taxed, and the particular real estate is taken possession of by the Government and sold to satisfy the tax. A direct tax upon personal property, such as the States ordinarily levy, likewise operates as a lien upon the particular property which is the object of the tax, and I presume that a tax upon the income from real estate, or all of one's personal estate, would operate in the same manner.

And, again, this tax has distinguishing characteristics of an indirect tax in that it is paid voluntarily. There is no element of compulsion present. The owner of the certificate of stock may hold his property and enjoy the fruits and benefits arising therefrom uninterruptedly for all time, and it is only when he elects to take advantage of the privilege afforded to him under the laws of his State, to wit, the sale or disposition of the share of stock, that he becomes liable for the tax. It is difficult to see where there is any element of compulsion in reference to a matter which a person may do or not do of his own free will. There is compulsion in a capitation tax, for the citizen can not escape it while he is living in the country. He can not escape a tax upon his lands, nor a tax upon his whole personal estate. Upon this question Dr. Wells has the following to say in his work on the Theory and Practice of Taxation (p. 342):

> A tax on commodities like whisky, tobacco, fermented liquors, oleomargarine, playing cards, dice, and the like, can always be avoided as a primary tax, or can be paid at discretion. But there is nothing voluntary in the payment of a tax upon *all* real or personal property, or on the income of such property. Human beings can not subsist without some forms of personal property, and therefore a tax upon all personal property or its income is of necessity compulsory and not voluntary. Any general assessments of personal property on or by reason

of its income, as well as assessments on real estate, are unavoidable in their nature, and therefore, from a philosophic or economic point of view, are typically direct taxes.

So in the case here under discussion, the owner of the certificate of stock may pay the tax or not just as he chooses, or he may require the purchaser to pay the tax, or the amount of the tax may be borne partially by each of the parties to the transaction, and the voluntary element is present in the law in any sense in which you may view its practical operation.

B.

The tax here imposed is not a direct tax within the meaning of the Constitution, for the reason that it is impossible to apportion it among the several States according to population.

(1) Every reason advanced by the justices of this court who dissented in the income-tax cases, on the ground that an income tax could not be apportioned among the several States, applies with equal or greater force to the apportionment of a tax levied upon the sales of certificates of stock.

(2) The opinion of the majority of the court in income tax cases distinctly recognized that a tax levied upon specific personal property, which might not be the subject of general distribution throughout the United States, but only of partial distribution, as, for example, cotton, tobacco, rice, etc., would be incapable of apportionment, and

must for that reason be held to be in the nature of a duty or excise, and therefore not direct taxation within the meaning of the Constitution. But they held that *all personal property*, being the subject of *general distribution* throughout the States, perhaps to the same extent as lands, that it was impossible to draw any distinction between a tax on lands and a tax on all of one's personal estate. And that, furthermore, there could exist inherently no greater difficulty in apportioning a tax on personal property generally than in apportioning a tax on lands.

(3) If it be impossible to apportion a tax on carriages, tobacco, cotton, rice, or whisky, and various other specific kinds of personal property for the reason that such subjects may not be articles of general distribution throughout the United States, would not the same difficulty apply to shares or certificates of stock which have been held to be personal property? It is only necessary to state that shares of stock in a corporation, especially in view of the fact that the situs of such property can be so easily changed, can not be claimed to be of *general distribution* throughout the United States, to the same extent, at least, in which real and all personal property is generally distributed.

(4) The difficulty of apportionment of a tax upon the sales of certificates of stock is apparent from the facility with which the situs of such property may be changed. The suggestion of Mr. Justice White, in his dissenting opinion in the second

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income tax case (p. 713), applies with even greater force to the law here under discussion. He says:

> The application of the rule of apportionment by population to invested personal wealth would not only work out this wrong but would ultimately prove a self-destructive process, from the facility with which such property changes its situs. If so taxed, all property of this character would soon be transferred to the States where the sum of accumulated wealth was greatest in proportion to population, and where, therefore, the burden of taxation would be lightest, and thus the mighty wrong resulting from the very nature of the extension of the rule would be aggravated.

So, in the case at bar, if it were held that notwithstanding the power of Congress to tax the sale of a certificate of stock, such tax must be laid by the rule of apportionment, the result could be better imagined than described. The sales of all certificates of stock, by reason of the facility with which the situs of such transactions could be changed, would soon be transferred to the States where the total sums of sales of certificates of stock was greatest in proportion to population, and where, therefore, the burden of taxation would be the lightest, and thus not only would a mighty wrong result, but many States might have no sales consummated in their borders, and would thus be unable to pay any portion of the tax so apportioned to them in accordance with their population.

C.

The tax here imposed may be sustained on the theory that it is a tax in the nature of a duty or excise upon transactions in business activity or forms of commercial dealing.

It can not be doubted that Congress has the power to declare that any person who shall engage in the business or occupation of buying and selling certificates of stock shall pay a tax measured by the price realized.

TAXES ON OCCUPATIONS, BUSINESS, AND PRIVILEGES.

The power to impose privilege and occupation taxes exists independently and concurrently in the State and Federal governments, subject to the constitutional restrictions; in the State governments subject to the exclusive rights conferred on Congress to regulate interstate commerce, and in the Federal Government subject to the prohibition of any interference with the internal regulations of the State.

Ward v. *Maryland*, 12 Wall., 418.
License Tax cases, 5 How., 504.
Nathan v. *Louisiana*, 8 How., 73.
Dobbins v. *Erie County*, 16 Peters, 435.
Ward v. *Maryland* (12 Wall., 418).

This was a case in which a statute of the State of Maryland required all traders, resident in the State to take out a license, and pay therefor certain sums, regulated by a sliding scale from $15 to

$150, according as the stock in trade might vary from $1,000 to $40,000. The tax was declared to impose a discriminating tax upon nonresident traders trading within the limits mentioned, and that it was a regulation of commerce between the States and repugnant to the Federal Constitution and void for the reason that it made it a penal offense for any person not a resident of the State to sell, or offer for sale, within certain limits of the State, goods, wares, and merchandise other than agricultural products and articles manufactured in Maryland. The court, however, in delivering the opinion, through Mr. Justice Clifford, said (p. 427):

> Power to tax for State purposes is as much an exclusive power in the States as the power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States is an exclusive power in Congress. Both are subject, however, to certain prohibitions and restrictions, but in all other respects they are supreme powers possessed by each government entirely independent of the other.

Mr. Chief Justice Chase, in the case of *Veazie Bank* v. *Fenno* (8 Wall., 533, 544), says:

> This review shows that personal property, contracts, occupations, and the like have ever been regarded by Congress as proper subjects of direct tax.

Mr. Chief Justice Fuller, in *Farmers' Loan and Trust Company* v. *Pollock* (157 U. S., 429), says:

> We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, and the income thereof, may not also lay excise taxes on business, privileges, employments, and vocations.

See also *Railway Company* v. *Collector* (100 U. S., 593, 598).

(D.)

The law may also be defended on the theory that the tax imposed is in the nature of a duty or excise upon the contract of sale itself, referring only to the fact that the subject-matter of the sale must be a certificate of stock as the basis or ground for classification.

Shortly after the formation and adoption of the Constitution a system of laying stamp duties upon contracts as such was inaugurated, and we find provisions to that effect running through the various acts of Congress from as early as 1794 down to and including the war-revenue act of June 13, 1898.

> By chapter 11, of the act of July 6, 1797, a stamp duty was placed on "bonds, bills, * * * foreign or inland bills of exchange, promissory notes, or other note for the security of money, * * * any certificate of a share in any insurance company, or any certificate of a share in the Bank of the United States, or of any State, or other bank," (section 1). Chapter 53, of the act of August 2, 1813, similarly laid

a tax on any bond, obligation or promissory note or notes not issued by any bank, companies, or banker, as aforesaid, discounted by any such bank, company, or banker, and on any foreign or inland bill or bills of exchange, above $50, and having one or more indorsers. Chapter 119, of the act of 1862 (12 Stat. at Large, 479), laid a tax upon bank checks, inland bills of exchange, drafts or orders for the payment of money, certificates of stock in any incorporated company, certificates of deposit, brokers' note, or memorandum of sale of any goods or merchandise, stocks, bonds, exchange, notes of hand, real estate, or property of any kind or description issued by brokers or persons acting as such, also any "deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons by his, her, or their direction;" also, any "lease, agreement, memorandum, or contract for the hire, use, or rent of any land, tenement, or portion thereof;" also, any "mortgage of lands, estate, or property, real or personal, heritable or movable whatsoever, where the same shall be made a security for the payment of any definite and certain sum of money, * * * ; also any conveyance of any lands, estate, or property, whatsoever, in trust to be sold or otherwise converted into money, which shall be intended only as security," etc.

In the case of *Veazie Bank* v. *Fenno*, Mr. Chief Justice Chase has the following to say as to the power of Congress to tax contracts:

> A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets, and it can not be doubted that the organization of railroads is quite as important to the State as the organization of banks. *But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad.*

And to the same effect is the language used by Mr. Justice White in the case of *Knowlton* v. *Moore* (178 U. S., 41, 59), wherein the power of Congress to tax contracts in the form of stamp duties was distinctly and positively recognized.

> Conveyances, mortgages, leases, pledges, and indeed all property, and the contracts which arise from its ownership, are subject, more or less, to State regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto can not be taxed by Congress, even in the form of a stamp duty. It can not be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those

> powers of taxation which, from the foundation of the Government, admittedly have belonged to them.

And, finally, in the case of *Treat* v. *White* (181 U. S., 264, 268), Mr. Justice Brewer, in delivering the opinion of the court, after saying that the question before the court was simply one of statutory construction, says:

> That no stamp duty was imposed on agreements to buy (or, in the vernacular of the stock exchange, "puts") furnishes no ground for denying the validity of the stamp duty on agreements to sell. The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to stamp duty and agreements to buy not. It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other.

(E.)

The tax here imposed may be sustained on the ground of its close analogy to the tax involved in the case of Hylton v. United States. (3 Dallas, 171.)

In the Hylton case a tax upon carriages was held to be an indirect tax in the nature of a duty or excise levied upon the use of the carriage. How much more indirect would be a tax levied upon the sale of carriages? The use of a carriage is a constant, continuing, and ever-present right which the owner

must continually exercise if he is to enjoy the benefits arising from the ownership, but the sale of the carriage is only an incidental or contingent right which the owner may never take advantage of, while in the meantime he continues in the fullest enjoyment of his property free from taxation. It is only in the event of a sale, which is, of course, purely voluntary upon his part, that the tax attaches, and even then it may be shifted in whole or in part upon the purchaser. On the authority of this case, and the succeeding cases to and including the Springer case, which, as we have seen, are not in conflict with the income tax cases wherein all one's personal property was contemplated, may not Congress lawfully impose a tax upon a certificate of stock directly by the rule of uniformity? Such a tax would evidently rest upon the specific kind of personal property. It is immaterial that the share or certificate of stock may stand for and represent divers kinds, of both real and personal property, for the law regards the certificate of stock as personal property, and it would seem to be immaterial what such certificate represents in its final analysis; but however that may be, it is quite clear that a tax upon the sale of such property is even more remote and incidental than a tax upon carriages, and would be similar to a tax imposed upon the sale of carriages.

F.

The tax here imposed may be sustained upon the theory that it is laid upon the privilege or facility afforded the owner of the stock, under and by virtue of the laws of the State authorizing the formation of the corporation, to sell and dispose of his property in the form of a certificate of stock.

It is the certificate of stock which is the evidence of the holder's title to the shares in the property and franchises of the corporation. The sale of the certificate is a transfer of such shares to another person. The State furnishes facilities whereby persons may form a corporation, which may designate the individual interests of its members by certificates transferable upon its books, so as to permit the holders to manage or direct the business of the corporation with such liability, privileges, and immunities as the charter and the law provide. Congress has declared that every person who holds such a certificate in such artificial body, and shall transfer by sale to another person the right to participate in such corporation, and to become a member thereof with the accompanying property rights and benefits, shall pay a tax on the contract or transaction whereby the transmission is effected. The State gives the privileges of the corporation to the stockholders, and if the Government may tax privileges why may it not tax this particular privilege. Membership in a corporation created by a State is an artificial privilege similar if not equal in degree to that in an incorporated exchange,

and the benefits of incorporation if taxable in one case on principle should be taxable in the other.

In the case of *Nicol* v. *Ames* (173 U. S., 521), in construing a very similar provision of the war-revenue act of 1898, Mr. Justice Peckham, in the course of the opinion, said:

> A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded.

If the above language of Mr. Justice Peckham be applied to all the facts under consideration in the case at bar it would read substantially as follows: A tax upon the privilege of selling property held in the form of a certificate of stock, and thus using the many advantages and facilities afforded the certificate holder in accomplishing the sale differs radically from a tax upon every sale of property, the title to which is not evidenced by a certificate of stock. The latter tax is really and practically but not directly upon the property within the meaning of the Constitution; it takes no notice of the kind of property, or rather the form in which the property is held and sold; the fact of the sale alone is regarded.

Congress has the power to tax franchises or privileges, although it may not have the power to

create them, providing always that such franchises or privileges are not agencies or instrumentalities made use of by the States as legitimate and necessary means of government.

A mere superficial examination of the law under discussion would justify the assertion that the tax imposed by this law rests upon the sale, or contract of sale, of shares or certificates of stock in a corporation. And were it not for certain decisions of this court, wherein a similar provision of this same law has received consideration, we would be inclined to take the position that the *real object* of the tax is the *contract of sale*, and that the mere fact that the law is limited in its application to property held in the form of a certificate of stock is important only in so far as it furnishes a basis of classification. In other words, that Congress, in the exercise of its undoubted powers of taxation, very properly recognized that there is a marked distinction between the sales of property represented by certificates or shares of stock and the sales of all other property not thus represented.

In the case of *Nicol* v. *Ames* (*supra*), the law under consideration provided as follows:

> Upon each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value or fractional part thereof in excess of one hundred dollars, one cent.

If the language of that law be followed and construed literally, it is apparent to the casual reader that the object upon which the tax is imposed by that law is *the sale or contract of sale*. It is true, however, that the law does not impose a tax upon every contract of sale, but only *contracts to sell products or merchandise*. This is the first limitation that we find the law imposes, and which limits the contract to only *such contracts as deal with sales of products or merchandise*. But upon reading further we find the second limitation, which still further narrows the scope of the operation of the law to contracts for the sale of products or merchandise *at an exchange or board of trade*. From a consideration of these two limitations upon the character of the sale, which is the object of the tax named in the law, one would naturally assume that these limitations were material only so far as they afforded a basis of classification—that is, that they limited and confined the operation of the tax within narrower limits, and to only such sales or contracts of sale as had to do with products or merchandise when effected and consummated at an exchange or board of trade. This court, however, did not stop at any such superficial examination of the law, but analyzed the law very critically for the purpose of determining the real object upon which the tax was imposed. In delivering the opinion of the court in that case Mr. Justice Peckham says:

> We think the tax is, in effect, a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. Whether this facility or privilege is such a thing as can be legally taxed, while leaving untaxed all other sales made outside of such places, will be discussed further on. At present it is enough to say that the tax is not upon the property sold, and can not on that ground be found to be direct.

And further:

> In holding that the tax under consideration is a tax on the privilege used in making sales at an exchange, we thereby hold that it is not a tax upon the memorandum required by the statute upon which the stamp is to be placed. The act does not assume to in any manner interfere with the laws of

> the State in relation to the contract of sale. The memorandum required does not contain all the essentials of a contract to sell. It need not be signed, and it need not contain the name of the vendee or the terms of payment.

An examination of this case, therefore, shows that the court, after a critical examination and analysis of the law, arrived at the conclusion that the tax imposed was not levied (primarily at least) upon the sale or agreement to sell, nor upon the parties to the contract on account of their membership in the association, nor upon the product or merchandise which was the subject-matter of the transaction, *but upon the facility or means which was afforded to members of such association to sell their products and merchandise at a particular place where they were afforded extraordinary and unusual privileges for the purposes of effecting the sale of merchandise.*

If, therefore, we subject the law under discussion to the same critical analysis that was applied to a similar provision of the war-revenue act of 1898 in the case of *Nicol* v. *Ames*, we may, with propriety, claim that the tax here imposed rests *ultimately upon the privilege* which every citizen enjoys *to dispose* of his property *in the form of a certificate of stock*, and that Congress, in imposing this tax, did not have in mind *the contract* or *business* of the parties to the contract, nor the *privilege* enjoyed by the stockholder in being permitted *to*

hold his property in *corporate form*, but the *right* or *privilege* which he enjoyed as a stockholder of a corporation *to dispose of his property in the form of a certificate of stock* with all the incidental benefits arising therefrom.

(G.)

A tax similar to the tax here under discussion has been uniformly regarded by the legislative and executive departments of the Government since its foundation as an indirect tax within the meaning of the Constitution.

(1) Tax on certain certificates of stock (1797):

By the act of July 6, 1797 (1 Stats., 527, 528), entitled: "An act laying duties on stamped vellum, parchment, and paper" a tax was levied upon—

> any certificate of a share in any insurance company, or any certificate of a share in the Bank of the United States, or of any State or other bank, above twenty dollars and not exceeding one hundred dollars, ten cents; above one hundred dollars, twenty-five cents.

(2) Tax on certificate of stock (1862):

By the act of July 1, 1862 (12 Stats., 432, 481), entitled, "An act to provide internal revenue to support the Government, and to pay interest on the public debt," a tax was laid upon—

> A certificate of stock in any incorporated company, twenty-five cents.

And again—

> Upon a broker's note, or memorandum of sale of any goods or merchandise, stocks, bonds, exchange, notes of hand, real estate, or property of any kind or description, issued by brokers or persons acting as such, ten cents.

(3) Tax on the sale or agreement to sell a certificate of stock (1898):

The act of June 13, 1898 (30 Stats., 448), imposing the tax here under consideration.

Reference is made to these various laws for the purpose of demonstrating that if any doubt arises as to the exact nature of this tax, resort may be had to the practical construction of similar laws by the legislative and executive departments of the Government.

Mr. Justice Brewer, in delivering the opinion of the court in *Fairbank* v. *United States* (181 U. S., 283, 311), says:

> From this *résumé* of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but

where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful.

Our contention is that there can be no doubt but that the tax here under consideration is an indirect tax within the meaning of the Constitution, but if there be any doubt upon that proposition this court should yield assent to the construction placed upon the law by those having actual charge of the execution of the statute, and the views of Congress as to the nature of the tax when enacting the law.

(H.)

And finally, it is contended that an act of Congress imposing a tax directly upon all shares or certificates of stock in all corporations and associations would be constitutional. A fortiori, is a law constitutional which merely taxes the sale, or agreement to sell, such property.

Let us suppose, for the purposes of the argument, that we have a law of Congress imposing a tax directly upon a certificate of stock in any corporation or association. Such a law would be similar, if not identical, to the act of Congress imposing a tax upon carriages, for while the law imposing a tax upon carriages had reference solely to certain particular and specific personal property, a law imposing a tax directly upon certificates of stock

would likewise have reference to only certain particular and specific personal property of the citizen. It is true a certificate of stock might represent divers and various kinds of both real and personal property; nevertheless a law taxing a certificate of stock, which has been held to be a species of personal property, would not fall within the definition or rule announced in the Pollock cases.

While such certificate of stock might represent all of the estate, both real and personal, of the owner, yet it would not do so necessarily and at all events. It might with the same reason be contended that a tax upon carriages in certain isolated and particular instances, where all the citizen's estate is invested in carriages, would operate as a tax upon his entire estate, yet the law would not have such effect necessarily; and it is clear that it was not the intention of the law-making power in enacting the law under discussion in the Hylton case, or in passing the law under discussion in the case which I have supposed, where the tax operates directly upon the certificate of stock, that the law should operate upon all the personal estate of the individual citizen.

In the Hylton case the tax was imposed directly upon carriages, and yet it was held to be an indirect tax in the nature of a duty or excise upon the use of the articles upon which the tax was directly imposed.

In *Pacific Insurance Company* v. *Soule* (7 Wall., 433), the validity of a tax which was described as "upon the business of an insurance company" was sustained on the ground that it was a duty or excise, and came within the decision in the Hylton case.

In *Veazie Bank* v. *Fenno* (8 Wall., 533, 544, 546), a tax was laid on the circulation of State banks, or national banks paying out notes, or individual State banks, and it was held that the law should be classed under the head of duties, and as falling in the same category as Soule's case (7 Wall., 434).

The same effect, *National Bank* v. *United States* (101 U. S., 1); *Scholey* v. *Rew* (23 Wall., 333); *Railroad Company* v. *Collector* (100 U. S., 595); *Springer* v. *United States* (102 U. S., 586, 602.)

In the case of *Patten* v. *Brady* (184 U. S., 608), a provision of the war revenue act of June 13, 1898, imposing a tax of 12 cents per pound directly "upon all tobacco and snuff, however prepared, manufactured, and sold, for consumption and sale," was under consideration.

Mr. Justice Brewer, in delivering the opinion of the court, held the law constitutional as imposing an indirect tax. He said:

> It is true other counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct tax * * * within the rule laid down in the income-tax cases, but, as we have seen, it is not a tax upon property as such, but

upon certain kinds of property, having reference to their origin and their intended use. It may be, as Dr. Johnson said, "a hateful tax levied upon commodities," an opinion evidently shared by Blackstone, who says, after mentioning a number of articles that had been added to the list of those excised, "a list which no friend to his country would wish to see further increased." But these are simply considerations of policy, and to be determined by the legislative branch, and not of power, to be determined by the judiciary. We conclude, therefore, that the tax which is levied by this act is an excise, properly so called, and we proceed to consider the further propositions presented by counsel.

So the tax here under consideration if it be considered as levied upon the certificates of stock themselves "is not a tax upon property as such but upon certain kinds of property, having reference to their origin and their intended use."

Is a taxed levied upon a certificate of stock so inherently different from the various tax laws laying a tax upon certain specific kinds of personal property as to remove it from the operation and sanction of those cases? And, on the other hand, can a law laying a tax directly upon a certificate of stock in a corporation be said to be essentially the same as a tax laid upon all one's personal estate, and thereby coming within the decision of this court in the income-tax cases? We answer both questions in the negative.

If it be important to determine the precise and ultimate object upon which this tax is imposed, we are inclined to take the position that primarily the tax rests upon the privilege which is afforded to the individual citizen to dispose of his property in the form of a certificate or share of stock in a corporation.

The law, as applied to the facts in this particular case, expressly designates the sale or agreement to sell a certificate of stock as the object or thing taxed, but in its last analysis the law imposes the tax upon the privilege which is afforded to the individual citizen to dispose of his property in the form of a certificate or share of stock, which he is permitted to hold and own in such form under the laws of the various States authorizing the creations of corporations and associations. It is not every sale, or agreement to sell property that is taxed, but only such sales and agreements to sell as pertain to certificates or shares of stock. We are, therefore, compelled to accept the final and determining element imposing a limitation upon the sale or agreement to sell as the real object of the tax, and the one which Congress must have had in mind when enacting the law.

VI.

A review and discussion of the cases relied upon by counsel for plaintiff in error, for the purpose of showing their misapplication to the case at bar, and the fallacy contained in the conclusion deduced therefrom.

In the case of *Brown* v. *Maryland* (12 Wheaton, 444):

> The legislature of the State of Maryland passed an act requiring all importers of foreign articles or commodities to take out a license as an authority to sell, for which they were required to pay a fee of $50. The payment of this license fee was resisted upon ground that the act under consideration was in violation of the clause of the Constitution of the United States prohibiting any State from laying any imposts or duties on imports or exports without the consent of Congress.

It will be observed that under this provision of the Constitution the various States were absolutely prohibited from laying any imposts or duties on imports or exports without the consent of Congress; consequently the State of Maryland did not have the power to impose any tax, either direct or indirect, and the court very properly decided that a tax on the sale of an article exported only for sale is a tax on the article itself.

But that case did not decide that such a tax was a direct tax. It was not necessary for the court to say whether it was direct or indirect, for, inasmuch as the legislature did not have any power to impose

any tax, direct or indirect, it made no difference whether the tax was imposed upon the article itself or upon the sale of the article imported; in either event such a tax was in violation of the Constitution prohibiting any State from laying imposts or duties on the imports and exports without the consent of Congess. And again in the case of *Welton* v. *Missouri* (91 U. S., 279):

> The legislature of the State of Missouri passed an act requiring peddlers of foreign-made goods to pay a license tax. The law was declared unconstitutional upon the ground that it was a tax upon foreign commerce and in contravention of the exclusive power of Congress to regulate commerce with foreign countries and between the States.

It will be observed that in that case the State legislature attempted to indirectly regulate commerce between the States, and inasmuch as the State did not have any power over the subject-matter it was held that it could not do that indirectly which it could not do directly.

So in the case of *Cook* v. *Pennsylvania* (97 U. S., 573):

> The legislature of the State of Pennsylvania passed an act requiring auctioneers to pay to the treasury of the State a tax on all sales made by them of foreign or imported goods. The law was declared invalid upon the ground that the tax on sales made by

an auctioneer was a tax on the goods sold and was unconstitutional because in contravention of the prohibition of a State tax on imports.

Here again, as in *Brown* v. *Maryland* (*supra*), the legislature of Pennsylvania was assuming to tax indirectly that which it had not the power to do, either directly or indirectly. There was an absence of power to lay any tax upon imports without the consent of Congress. And while the court said that "the tax on sales made by an auctioneer is a tax on the goods sold," it did not say, nor was it necessary nor proper that it should say, that such a tax was a *direct tax*. It did not make any difference whether it were *direct* or *indirect*, the State of Pennsylvania did not have the power or authority to impose any tax whatsoever in such a case.

And again in *Fairbanks* v. *United States* (181 U. S., 294). In that case Congress itself attempted to lay a tax or duty upon an article exported from a State in the form of a direct tax on a bill of lading, evidencing the fact that such article had been exported, and it was held that such a tax was unconstitutional, because it ran counter to the express provision of Article I, section 5, of the Constitution, which says: "No tax or duty shall be laid on articles exported from any State." So far as this prohibition of the Constitution is concerned it made no difference whether the tax laid by Congress was direct or indirect. The language is "no

tax or duty." That language is sufficiently comprehensive to embrace any tax, whether direct or indirect. And while the court said in that decision, "if it be true that a stamp tax required upon every instrument evidencing a sale is really and practically a tax upon the property sold, it is equally clear that a stamp duty upon foreign bills of lading is a tax upon the articles exported," that decision did not hold that because a tax on a bill of lading is a tax upon the article exported, that therefore it is a *direct tax* upon such article exported. It made no difference for the purpose of that case whether it was a direct tax or an indirect tax, each was equally obnoxious, and prohibited by the provision of the Constitution, and Congress was powerless to impose any tax or duty direct or indirect of whatsoever character or description upon any article exported from any State.

From this brief review of the cases relied upon by counsel for the plaintiff in error it will be seen that they have absolutely no bearing upon the precise question here under consideration. The case of *Nicol* v. *Ames* (173 U. S., 519) is confidently relied upon by counsel, separate and apart from the other cases, as sustaining his contention that the tax here under discussion is a direct tax. The following excerpt from that decision, and which counsel seems to consider to be decisive of this question, will now be discussed:

> A tax upon the privilege of selling property at the exchange and of thus using the

> facilities there offered in accomplishing the sale *differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property.*

The words in italics are evidently relied upon by counsel as having an immediate bearing upon the question here under consideration. It may be admitted that the tax upon the privilege of selling property at an exchange differs radically from a tax upon every sale made in any place. That difference was the basis afforded Congress for the classification adopted in the law; and by means of that difference and the classification thus adopted the tax was made to operate uniformly or generally throughout the United States. That is, it was made to apply to the sale of property on boards of trade and exchanges, and of facilities thus afforded in accomplishing such a sale, while at the same time, every sale made in any place was not burdened with such a tax. And the concluding portion of that excerpt, to the effect "that a tax on every sale made in any place is really and practically a tax upon property," is the clause which evidently affords counsel his ground for the contention that it is a direct tax. But if a tax on every sale made in any place is really and practically a tax on property, does not Congress have the power to impose *a tax* on property? And does the language of Mr. Justice Peckham that "a tax upon every sale made in any place" mean that

such a tax is really and practically *a direct* tax upon property? Far from it. The opinion simply says that *it is a tax upon property*. And Congress has the power to impose *a tax upon property*, providing that if it be *a direct tax* it must be *apportioned*, and if an *indirect tax* uniformity alone is sufficient. It will therefore be seen that the decision of *Nicol* v. *Ames*, and the language therein contained, comes very far from holding that because a tax on the sale of property is a tax on the property itself, it is therefore a *direct tax* upon such property.

CONCLUSION.

To briefly summarize the preceding argument and conclusions:

The tax here under discussion, levied upon a sale or an agreement to sell a certificate of stock, is neither *a tax upon an article exported from any State*, nor upon *a means, instrumentality, or agency of a State government*, and is therefore clearly within the power of Congress to enact, subject only to the constitutional rule that if it be a direct tax it must be apportioned, and if it be an indirect tax it must be uniform. It has, we think, been conclusively demonstrated that a tax upon a sale or agreement to sell a certificate of stock is not *a direct tax within any of the classes of direct taxation heretofore adjudged to be such by the decisions of this court*. And in addition thereto it has been most

positively shown, as we think, that the tax imposed is indirect in its character within every definition of that phrase as found in the various opinions of this court.

It is respectfully submitted that the judgment of the circuit court for the southern district of New York should be affirmed.

MILTON D. PURDY,
Assistant Attorney-General.

APPENDIX A.

PROHIBITIONS ON THE TAXING POWER OF THE STATES.

(a) EXPRESS PROHIBITIONS.

1. "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws * * *." (Art. I, sec. 10, par. 2, Constitution.)

Illustrative cases:

Brown v. *Maryland*, *12 Wheat.*, *419*.
Cook v. *Pennsylvania*, *97 U. S.*, *566*.

These cases clearly illustrate the principle of law that when there is entire want of power to tax the forbidden object, that a tax levied upon such object, even though indirectly and remotely affecting such object, that such a tax is unconstitutional and not within the power of the State to impose.

2. "The Congress shall have power: * * * To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (Art. 1, sec. 8, par. 3, Constitution.)

Illustrative cases:

Welton v. *Missouri*, *91 U. S.*, *275*.
Leloup v. *Mobile*, *127 U. S.*, *640*.
Railway Company v. *Jackson*, *7 Wall.*, *262*.
Philadelphia Steamship Company v. *Pennsylvania*, *122 U. S.*, *326*.
Postal Tel. Co. v. *Adams*, *155 U. S.*, *688*.
Robbins v. *Shelby Co. Comrs.*, *120 U. S.*, *489*.
Brown v. *Maryland*, *supra*.
Cook v. *Pennsylvania*, *supra*.

These cases are illustrative of the principle of law that since the Constitution gives Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, that such power is, in its nature, exclusive, and that the States are forbidden absolutely to exercise such power, and that if they impose a tax which seeks to regulate commerce, that such tax will be unconstitutional for the reason that there is an entire want of power on the part of the State to enforce such regulations.

(b) IMPLIED PROHIBITIONS.

1. The various States are prohibited from taxing the means, instrumentalities, and agencies of the General Government.

Illustrative cases:

McCulloch v. *Maryland*, 4 Wheat., 315.
Weston v. *Charleston*, 2 Peters, 449.
Dobbins v. *Erie County Comrs.*, 16 Pet., 435.

APPENDIX B.

VARIOUS DEFINITIONS AND ILLUSTRATIONS OF THE ECONOMICAL AND POLICTICAL MEANING OF THE WORD TAX.

Perhaps one of the best definitions of the word tax that has been given is the definition of Prof. C. F. Bastable, in his work on Public Finance (p. 249):

> A tax is a compulsory contribution of the wealth of a person or body of persons for the service of the public power.

In this definition it will be noticed that each word used has a peculiar signification. In the first place, it is compulsory, and while some persons may be willing to give the contribution to the State, nevertheless the law imposing the tax makes it compulsory. In the next place, it is a contribution; that is to say, it involves a sacrifice on the part of the contributor, for every tax necessitates a deduction from the wealth of the contributor, even though compensation may indirectly be brought about by the action. In the next place, it is a contribution from the wealth, and, of course, in this sense, wealth is understood in its very largest and most comprehensive meaning, including services, money, property of all kinds, natures, and descriptions, rights, privileges, etc.; and in the next place, it is imposed on persons. This necessarily follows from the circumstance that the payment of a tax is a duty, and persons

only can be liable to duties. And while the proposition is apparently inconsistent with the division of taxes into personal and real, there is, however, no opposition between the different uses. The term "real taxation" refers to the *object* of taxation; the owner or ultimate bearer is the *subject* of the tax, and he is a person. The remaining phrases, "service" and "public power," require no special consideration.

Prof. David A. Wells's Theory and Practice of Taxation says:

> This word tax, in the English language, and its equivalent in all other languages, is used in a very loose and indefinite sense. Many writers and dictionary makers generally use the word in an extremely generic sense to cover and designate all contributions obtained by process of assessment and levy by a state or government from the persons and property of its citizens, or from persons and property within its jurisdiction, in whatever form, and however arbitrary the assessments or levies may be, and by whatever name they may be known or designated, whether tribute, toll, carriage, duty, gabelle, customs, imports, poll, subsidy, aid, excise, income, or benevolence.

Webster's definition:

> A tax is a rate or sum of money assessed on the person or property of a citizen by government, for the use of the nation or state.

Century Dictionary:

> 1. A disagreeable or burdensome duty or charge; an exaction; a requisition; an oppressive demand; strained; burden; task. 2. An enforced proportional contribution levied on persons, property, income, either

(*a*) by the authority of the state for the support of the government, and for all its public or governmental needs, or (*b*) by local authority, for general municipal purposes.

Miller on the Constitution of the United States (p. 235):

> The definition of both Webster and Story is that a tax is a contribution imposed by Government on individuals for the service of the State.

Cooley on taxation (p. 1):

> Taxes are defined as the enforced proportional contributions of persons and property levied by the authority of the State for the support of the Government, and for all public needs.

J. R. McCulloch:

> A tax is a portion, or the value of a portion, of the property or labor of individuals taken from them by Government and placed at its disposal.

Prof. David A. Wells, in his Theory and Practice of Taxation (p. 202), gives the following definition of tax:

> It is that certain portion of the product of a country which must be devoted to the support of the Government.

This definition, Professor Wells states, is deduced from the statement of Mr. Atkinson as to what is the meaning of taxation, which is as follows:

Prof. Edward Atkinson, in his work entitled The Industrial Progress of the Nation:

> Taxation means work of the head, of the hand, or of the machine, or all combined, and the method of taxation is only a method of dissipating the products of work. It is

measured here in the process of distribution in terms of money, but the money itself stands for work and is derived from work, and the work of the Government is as much a part of the work of the community as any other. All who work, from the head of the nation down to the lowest municipal official, must be supplied with shelter, food, and clothing, and this is met by the taxes doing the work that is necessary to furnish this supply.

For a very full discussion of the definitions, object, and sphere of taxation, see Theory and Practice of Taxation, David A. Wells, chapter 9.

THE POPULAR THEORY OF TAXATION IN THE UNITED STATES, STATED AND EXAMINED.

The general idea which constitutes the basis of the system of State or local taxation, mainly recognized in the United States (though not in other countries) and generally known and designated as "the general property tax," is founded on the assumption that in order to tax equitably it is necessary to tax everything; the term everything being at the same time used in a sense so indefinite as to embrace not merely things in the nature of physical actualities other than persons, but also persons, incomes, rights, representatives of property, titles, trusts, conclusions of law, debts, and, in short, any act of assessing capable of resulting in the obtaining of revenue. As a logical consequence of this idea, the exemption of anything from taxation is furthermore held to be not only impolitic but unjust, and if made necessary by circumstances, as something to be regretted. (David A. Wells, Theory and Practice of Taxation, p. 392.)

It seems that it was this popular theory of taxation which was under consideration in the income-tax cases; that is, that the law of Congress, under discussion in those cases, had application to a general property tax, and that it made no difference whether it related to a general real property tax or a general personal property tax, or the incomes derived therefrom.; that in any and all such cases it would amount to direct taxation.

> The general property tax for general State purposes exists in all but four of the States of the Federal Union—Delaware, New Jersey, Pennsylvania, and Wisconsin. In Delaware there had been no property tax since 1877, as its expenses are defrayed mainly by licenses and taxes on railroads. In New Jersey there is only a school tax on property, but no property tax for general State purposes. In Pennsylvania the State tax is levied only on personal property. In Wisconsin the so-called State tax is levied only to defray the interest of the debt and for the purpose of contributing to the university, schools, and expenditures on account of the insane, but there is no property tax for general purposes. In addition to these four cases, a property tax is levied in Vermont only in case the public tax does not suffice to pay the entire expenses of the State. (David A. Wells, Theory and Practice of Taxation, p. 393.)

APPENDIX C.

DEFINITIONS OF THE TERMS DUTIES, IMPOSTS, AND EXCISES.

(a) Duties:

The Century Dictionary defines duty as follows:

> A tax or impost; excise or customs dues; the sum of money levied by a government upon certain articles, specifically on articles imported or exported: as, the stamp duty of Great Britain; the legacy duty; the duties on sugar; ad valorem and specific duties.

Andrews, in his work on Revenue Laws, section 133, says:

> The word duties is often used as synonymous with taxes, but is more often used as equivalent to customs; the latter being taxes involved upon goods and merchandise which are exported or imported. In this sense duties are equivalent to imposts, although the latter word is often restrained to duties on goods and merchandise which are imported from abroad.

The American and English Encyclopædia of Law, second edition, vol. 10, page 351:

> Duty means a tax, toll, impost, or custom.

In the case of *Pacific Insurance Company* v. *Soule* (7 Wall., 445), duties are defined as follows:

> Duties are defined to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than taxes. It is applied, in its most restricted meaning, to customs, and in that sense is nearly the synonym of imposts.

In *State* v. *Orleans Navigation Company* (11 Martin (La.), 153), it is said:

> A duty is a tax or impost raised by a State for the use of its government. A toll, on the contrary, signifies a payment in towns, markets, and fairs for goods and cattle bought and sold. It is a reasonable sum of money due to the owner of the fair or market upon sale of things tollable within the same.

(b) Imposts:

Professor Wells defines imposts as follows:

> The term impost is a general expression for any tax, duty, or tribute, but is seldom now applied to any but indirect taxes on imports.

Origin of the terms imposts and duties.

> The origin of all these terms is obscure and involves some interesting features in English history. It appears certain that they were in the first instance applied to exactions on trade generally and not, as was finally the case, on imports and exports exclusively, and were in use before indirect taxes on personal property were recognized in England. At the outset and for a long period they were also not regarded in the light of taxes, but rather as dues personal to the sovereign, which he had the right to regulate and collect independent of any statute and which carried with it the further right to restrain at pleasure the import or export of any commodity. Thus, until the reign of Edward II (1272–1307) the right to tax the export of the wool was exclusively a royal privilege; and the enactment of a statute by Parliament in 1275, limiting the amount that the King could take in respect

> to the export of wool, skins, and leather—but not denying the privilege—*is regarded as the first legal foundation* in England of the customs revenue. The controversy between the King and Parliament over customs duties went on, however, with varying phases until finally settled in 1682; and from these circumstances, and also from the fact that customs and duties are unseen by those who finally bear their burden because they are embodied in the prices of commodities, has possibly come about the curious idea that tariffs, or taxes on imports, are not taxes on any one or are any burden on property, but rather some sort of a business contrivance for the raising of revenue, and, if they are taxes at all, then that the foreigner pays them. (Professor Wells's Theory and Practice of Taxation, p. 379.)

Professor Bastable, in his work on Public Finance (p. 512), says:

> The taxation of goods at the frontier or on passing a fixed boundary line—what is known in England as the customs revenue—is far older than the system of internal duties. Almost from the origin of commerce we can find traces of its development and can note its gradual development into an important source of state income. Nor has it as yet lost much of its prominence. Notwithstanding the great increase of other branches of taxation, customs are still a conspicuous part of nearly every national budget, and in some countries are regarded as the only convenient mode of levying dues on consumption.

But however vague or uncertain the original and historical meaning of the terms "duties" and "imposts" may be, and whatever may have been the precise meaning of these terms at the time that

the Constitution was adopted, there is little room for doubt that at that time, and since that time, the terms had become considerably enlarged in their meaning and application to the taxes which they were intended to designate. But notwithstanding the extensive application of those terms at the time of the adoption of the Constitution, it is universally admitted that as used in the Constitution they had reference to only such taxes as were indirect in their essential characteristics, and were so regarded by political economists of that day, and by the framers of the Constitution and the judicial decisions wherein these terms have received consideration. They are, therefore, of little moment in the discussion of the case here under consideration, for the tax here imposed, while it may be included in the word "duty" in the more enlarged definition of that term, is essentially and necessarily an excise tax, and since the term "excise" is specifically referred to in the Constitution, it makes little difference whether or not it is also properly regarded as a duty.

(c) Excise:

Professor Wells, in his work above referred to (p. 380), has the following to say with reference to the origin and meaning of this term:

> The term excise, though used in the Constitution of the United States, is now almost entirely restricted in use to the tax system of Great Britain, and even there has acquired a far different meaning and application from what it possessed originally. Thus the term was first applied in England to taxes on manufactured commodities produced and consumed in the kingdom, as beer, cider, soap, glass, paper, and the like, and

in contradistinction to duties or customs on commodities of foreign manufacture and importation; and this distinction is still officially recognized in the fact that special care has always been taken in all British legislation on this subject to make the excise tax as nearly equal as possible to the customs imposed on the same kind of imported commodities. The term is supposed to find its origin also in the circumstance that it was originally the practice to cut off, or "excise," portions of the goods assessed, and take them away in payment of the tax in kind. The first attempt to impose an excise tax in England was in 1525, and failed, as both houses of Parliament concurred in opinion that it was unconstitutional. After the restoration, or under Charles II, the attempt was successfully renewed, and the taxes under it were very curiously divided into two classes, and the receipts from the same made personal to the Crown—namely, the hereditary excise, so called because granted to the Crown forever in consideration or recompense for the abandonment by the Crown of certain perquisites and privileges, and the temporary excise, the receipts of which were only granted to the sovereign for life. The tax was, however, always unpopular in England, being regarded as contrary to the spirit and principles of a just government, and on the accession of William and Mary it was greatly modified and reduced; and it is somewhat curious that a term having such an origin and history should have found a place in the Federal Constitution and be thus recognized as a legitimate form of taxation under a free government. In Great Britain at the present time the only commodities on which taxes designated as excise are assessed are

spirits, malt, fermented liquors, and chicory or other substitutes for coffee. But, in addition, the British system classifies, under the head of excise, its taxes on railways and a few other minor subjects.

Justice Miller's definition of excise:

> The late United States Justice Miller defined an excise tax as one which is assessed upon some article of property or money, or something which is exhausted in the use. This one, from its nature, must be paid by the bearer or last man who buys or uses the property, because whoever has it at the time when the tax is levied upon it adds that amount to the selling price when he comes to dispose of it until the property is sold. It is a tax on consumption.

Mr. Justice Field, in his concurring opinion upon the income-tax cases (157 U. S., 592), defines excise as follows:

> Excises are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them.

In the opinion on the rehearing, in discussing the meaning of the words "duties, imposts, and excises," used in the Constitution, Mr. Chief Justice Fuller, speaking for the court, says (158 U. S., 622):

> Cooley (on Taxation, p. 3) says that the word "duty" ordinarily "means an indirect tax imposed on the importation, exportation, or consumption of goods;" having "a broader meaning than custom, which is a duty imposed on imports or exports;" that "the term impost also signifies any tax,

> tribute, or duty, but it is seldom applied to any but the indirect taxes. An excise duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities.

In *Pacific Insurance Co.* v. *Soule* (7 Wall., 433), Mr. Justice Swayne, speaking for the court, adopts the following definition of an excise tax (bottom p. 445):

> Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor. (Citing Bateman's Excise Law, 96; Story's Const., sec. 953; 1 Blackstone's Com., 318.)

The Century Dictionary defines the word "excise" as follows:

> An inland tax or duty imposed on certain commodities of home production and consumption, as spirits, tobacco, etc., or on their manufacture and sale.
>
> In Great Britain the licenses to pursue certain callings, to keep dogs, to carry a gun, and to deal in certain commodities, are included in the excise duties, as well as the taxes on armorial bearings, carriages, servants, plate, railways, etc. Excise duties were first imposed by the Long Parliament in 1643.

Blackwell, in his work on Tax Titles, fourth edition, says:

> An excise is based on no rule of apportionment or equality whatever, but is a fixed, absolute, and direct charge laid on merchandise, products, or commodities,

> without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is paid.

While originally the term "excise" may have been confined in its application to a tax upon articles which were exhausted in the consumption, it is evident that the definition of that term was gradually enlarged in the course of legislative and judicial construction, until at the time of the Pollock case it not only embraced and included a tax upon articles which were exhausted in their consumption, but included certain rights, privileges, or licenses of the individual citizen with respect to his property.

Nicol v. *Ames* (173 U. S., 509).

In this case the court held that a tax authorized by the act of June 13, 1898, upon the sale of property made on a board of trade or exchange is not a direct tax, nor a tax upon the business itself which is so transacted, but is a duty upon the facilities made use of and actually employed in the transaction of the business, separate and apart from the business itself, and the court said:

> At present it is enough to say that the tax is not upon the property sold, and can not on that ground be found to be direct. The tax laid in the same act upon a broker's note or memorandum of sale is a separate tax, although it may have reference to the same transaction. It is a tax on the note or memorandum itself where made by a broker; while in the other case the tax, although measured in amount by reference to the value of the thing sold, is in reality upon

> the privilege or facility used in the transaction or sale. The tax is not a direct tax within the meaning of the Constitution, but is, as already stated, in the nature of a duty or an *excise*.

From this decision it appears that the term "excise" was still further enlarged in its meaning so as to cover a tax upon a privilege or facility used in effecting a sale by means of a stock exchange.

APPENDIX D.

VARIOUS DEFINITIONS OF THE TERMS "DIRECT" AND "INDIRECT" TAXES.

(1) *Definition of Mr. Edmunds* (157 U. S., 491):

> But my definition is—and I believe it to be generally found to be universally true—that a direct tax is a tax upon every kind of property and upon every kind of person in respect of himself, or in respect of his property, either in existence or acquired, or to be acquired, and not in respect to his voluntary calling, pursuit, or acts, as importing goods which he may import or not import as he pleases, not in respect of his being a trader or manufacturer, etc., in all of which cases he is taxed as a consequence of his free choice of business and in all of which the burden is to some degree moved on—but in respect of things that belong to the existence of property as an entity—a state of physical being.

(2) *Mr. Justice Brown* (157 U. S., 491) said:

> Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else.

(3) *Definition of Mr. Chief Justice Fuller* (157 U. S., 558):

> Ordinarily all taxes paid primarily by persons who can shift the burden upon some

one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect to their estates, whether real or personal, or of the income yielded by such estates, and the payment of which can not be avoided, are direct taxes. Nevertheless, it may be admitted that although this definition of direct taxes is *prima facie* correct, and to be applied in the consideration of the question before us, yet that the Constitution may bear a different meaning, and that such different meaning must be recognized.

(4) *Definition of Mr. Sedgwick* (157 U. S., 568):

In the debates in the House of Representatives preceding the passage of the act of Congress to lay "duties upon carriages for the conveyance of persons," approved June 5, 1794 (1 Stats., 373, c. 45), Mr. Sedgwick said that "a capitation tax and taxes on land and on property and income generally were direct charges, as well in the immediate as ultimate sources of contribution. He had considered those, and those only, as direct taxes in their operation and effects. On the other hand, a tax imposed on a specific article of personal property, and particularly if objects of luxury, as in the case under consideration, he had never supposed had been considered a direct tax within the meaning of the Constitution."

(5) *Definition of Albert Gallatin* (157 U. S., 569):

The most generally received opinion, however, is that by direct taxes in the Constitution those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense. As that opinion is in itself rational, and conformable to the decision which has taken place on the subject of the carriage tax, and

as it appears important, for the sake of preventing future controversies, which may be not more fatal to the revenue than to the tranquillity of the Union, that a fixed interpretation should be generally adopted, it will not be improper to corroborate it by quoting the author from whom the idea seems to have been borrowed. (He then quotes from Smith's Wealth of Nations, and continues): The remarkable coincidence of the clause of the Constitution with this passage in using the word "capitation" as a generic expression, including the different species of direct taxes, an acceptation of the word, peculiar, it is believed, to Dr. Smith, leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by *direct* taxes, meant those paid *directly* from and falling *immediately* on the revenue; and by *indirect*, those which are paid *indirectly* out of the revenue by falling immediately upon the expense. (3 Gallatin's Writings (Adams's ed.), 74, 75.)

(6) *Definition by Mr. Justice Chase, Mr. Justice Iredell, and Mr. Justice Paterson, in the Hylton case:*

Mr. Justice CHASE. I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution are only two, to wit: A capitation or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land. I doubt whether a tax, by a general assessment of personal property within the United States, is included within the term direct tax.

Mr. Justice PATERSON: The Constitution declares that a capitation tax is a direct tax, and both in theory and practice a

tax on land is deemed to be a direct tax. * * * It is not necessary to determine whether a tax on the product of land be a direct or indirect tax. Perhaps the immediate product of land in its original and crude state ought to be considered as the land itself; it makes part of it; or else the provision made against taxing exports would be easily eluded. Land independently of its produce is of no value. * * * Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax, and taxes on land is a questionable point. * * * All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax.

Mr. Justice IREDELL: There is no necessity or propriety in determining what is or is not a direct or indirect tax in all cases. Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil—something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description. * * * In regard to other articles, there may possibly be considerable doubt. It is sufficient on the present occasion for the court to be satisfied that this is not a direct tax contemplated by the Constitution in order to affirm the present judgment, since if it can not be apportioned, it must necessarily be uniform.

(7) *Hamilton's definition* (157 U. S., 572):

The following are presumed to be the only direct taxes: Capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of

individuals, or on their whole real or personal estate. All else must of necessity be considered as indirect taxes.

(8) *Definition of Mr. Chief Justice Chase in Veazie Bank* v. *Fenno* (8 Wall., 546):

> It may be safely assumed, therefore, as the unanimous judgment of the court, that a tax on carriages is not a direct tax. And it may further be taken as established upon the testimony of Paterson that the words direct taxes, as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.
>
> It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity.

(9) *Definition of Judge Cooley, in his work on Constitutional Limitations* (595, fifth edition, marginal paying *480):

> Direct taxes, when laid by Congress, must be apportioned among the several States according to the representative population. The term "direct taxes," as employed in the Constitution, has a technical meaning, and embraces capitation and land taxes only.

(10) *Miller on the Constitution, 237, thus puts it:*

> Under the provisions already quoted the question came up as to what is a "direct tax," and also upon what property it is to be levied, as distinguished from any other tax. In regard to this it is sufficient to say that it is believed that no other than a capitation tax of so much per head and a land

tax is a direct tax within the meaning of the Constitution of the United States. All other taxes, except imposts, are properly called excise taxes. Direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate.

(11) *In Pomeroy's Constitutional Law* (§ 281) *the definition is as follows:*

It becomes necessary, therefore, to inquire a little more particularly, What are direct and what indirect taxes? Few cases on the general question of taxation have arisen and been decided by the Supreme Court for the simple reason that, until the past few years, the United States has generally been able to obtain all needful revenue from the single source of duties upon imports. There can be no doubt, however, that all the taxes provided for in the internal-revenue acts now in operation are indirect.

This subject came before the Supreme Court of the United States in a very early case, *Hylton* v. *United States*. In the year 1794 Congress laid a tax of $10 on all carriages, and the rate was thus made uniform. The validity of the statute was disputed; it was claimed that the tax was direct and should have been apportioned among the States. The court decided that this tax was not direct. The reasons given for the decision are unanswerable, and would seem to cover all the provisions of the present internal-revenue laws.

(12) *Hare on American Constitutional Law* (vol. 1, pp. 249, 250), says:

Agreeably to section 9 of Article I, paragraph 4, "no capitation or other direct tax shall be laid except in proportion to the

census or enumeration hereinbefore directed to be taken;" while section 3 of the same article requires that representation and direct taxes shall be apportioned among the several States * * * according to their respective numbers. Direct taxes in the sense of the Constitution are poll taxes and taxes on land.

(13) *Burroughs on Taxation* (p. 502):

Direct taxes.—The kinds of taxation authorized are both direct and indirect. The construction given to the expression "direct taxes," is that it includes only a tax on land and a poll tax, and this is in accord with the views of writers upon political economy.

(14) For the definition of Ordronaux, in his Constitutional Legislation (p. 225), see 157 U. S., 624.

(15) *Black on the Constitution* (p. 162), says:

But the chief difficulty has arisen in determining what is the difference between direct taxes and such as are indirect. In general usage, and according to the terminology of political economy, a direct tax is one which is levied upon the person who is to pay it, or upon his land or personalty, or his business or income, as the case may be. An indirect tax is one assessed upon the manufacturer or dealer in the particular commodity, and paid by him, but which really falls upon the consumer, since it is added to the market price of the commodity, which he must pay. But the course of judicial decision has determined that the term "direct," as here applied to taxes, is to be taken in a more restricted sense. The Supreme Court has ruled that only land taxes and capitation taxes are "direct," and no others. In 1794 Congress levied a tax of $10 on all carriages

kept for use, and it was held that this was not a direct tax. And so also an income tax is not to be considered direct. Neither is a tax on the circulation of State banks, nor a succession tax, imposed upon every "devolution of title to real estate."

(16) *Definition by Mr. Justice Swayne in Springer v. United States* (102 U. S., 602):

> Our conclusions are that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty.

(17) Prof. C. F. Bastable, professor of political economy in the University of Dublin, in a recent work on Public Finance (p. 249), gives the following definition of a tax:

> A tax is a compulsory contribution of the wealth of a person or body of persons for the service of the public powers.

And in the same work, on page 256, he states:

> One of the most widely known and frequently used divisions of taxation is that into "direct" and "indirect;" unfortunately it is used in different senses, though with several points of connection. That most familiar to English readers is stated by J. S. Mill in the following terms:
>
> "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." (Principles, bk. 5, chap. 3, sec. 1.)

And Professor Bastable, in commenting on this definition, says that "whatever be its economical importance, it is evidently useless for administrative purposes, and probably owes its origin to the peculiar theory of the Physiocrats respecting the source of taxation. A natural result has been that practical financiers have adopted a different basis of distinction, and regard those taxes as direct which are levied on permanent and recurring occasions; while charges on occasional and particular events are placed under the category of indirect taxation. On either method the income tax would be direct, and the excise and customs indirect; the death duties would be direct from Mill's point of view, and indirect in the administrative sense."

(18) David A. Wells, in his work on the Theory and Practice of Taxation, has the following to say with reference to direct and indirect taxes:

> Taxes are generally characterized or classified as being either direct or indirect; but these terms, although in common use, are somewhat indefinite, owing to the inability of economists to agree as to their exact meaning; while in the United States this indefiniteness has been increased by the circumstance that its Supreme Federal Court has felt compelled by the language of the Federal Constitution to assign to the term "direct," as applicable to taxation, a "legal" rather than economic definition.
>
> In a general sense the term direct is applied to those taxes which are demanded from the particular persons who it is intended or desired shall pay them; and indirect to those which are demanded from a person with the expectation and intention that he shall indemnify himself for payment

of the same at the expense of some other person. There is, furthermore, marked distinction, founded on sound philosophy, between a direct and indirect tax, which, if concisely expressed, will constitute two unimpeachable definitions. Thus an indirect tax, whoever may first advance it, is paid voluntarily and primarily (in the sense ultimately) by the consumer of the taxed article. On the other hand, a direct tax has always in it an element of compulsion; not necessarily on the person who advances the tax in block, but on the person who is compelled to use or consume the taxed property or its product. For example, there is nothing compulsory or unequal in an ordinary license tax. If the license is high, no one is compelled to engage in a business covered by its legal requirements; and few persons will until the average profits of the taxed business by the regular laws of competition finally reach the average profits of other like employments or investments. A tax on commodities like whisky, tobacco, fermented liquors, oleomargarine, playing cards, dice, and the like, can always be avoided as a primary tax, or can be paid at discretion. But there is nothing voluntary in the payment of a tax upon all real or personal property, or on the income of such property. Human beings can not subsist without some forms of personal property, and therefore a tax upon all personal property or its income is of necessity compulsory and not voluntary. Any general assessments of personal property on or by reason of its income, as well as assessments on real estate, are unavoidable in their nature, and therefore, from a philosophic or economic point of view, are typically direct taxes.

The presence or absence of the principle of compulsion as constituting the essential difference between a direct and an indirect tax has not, it is believed, been before generally recognized by economists. And yet it is clearly involved or comprised in the definitions given by acknowledged authorities on the subject. Thus M. Leroy-Beaulieu, in his Traité de la Science des Finances, characterizes those taxes "as direct which the legislator intends should be paid at once and immediately by him who bears their burden. They strike at once his fortune or his revenue, and every intermediary between him and the treasury is suppressed." McCulloch (Principles of Taxation) describes a tax "to be direct when it is immediatety taken from property," and indirect "when it is taken from its owners by making them pay for liberty to use certain articles or exercise certain privileges." M. Say defines a direct tax to be the "absolute demand of a specific portion of an individual's real or supposed revenue." (Political Economy, p. 461.)

O

In the Supreme Court of the United States
Motion to advance

FILED
MAY 9 1902
Clerk

Filed May 9, 1902

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 425.

GEORGE C. THOMAS,
Plaintiff in Error,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

FRANK D. PAVEY,
Counsel for George C. Thomas.

C. H. Reisner, Walker and Ogden Street, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 650.

GEORGE C. THOMAS,
Plaintiff in Error,

AGAINST

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

The plaintiff in error, George C. Thomas, is a citizen of the United States of America and a resident of the City of New York, in the County and State of New York. He was arrested on the 2nd day of August, 1901, under an indictment which charged him with having sold and transferred certain shares of stock without placing on the memorandum of sale thereof the revenue stamps required by the provisions of Section 25, Schedule A, (entitled "Stamp Taxes"), of the "Act to provide ways and means to meet war expenditures, and for other purposes", approved June 13, 1898. He demurred to the indictment upon the ground that the facts alleged in said indictment did not constitute an infringement of, or a crime against the laws of the United States for the reason that the portions of the Act of Congress entitled "An Act to provide ways and means to meet war expenditures, and for other purposes", approved June 13, 1898, and known as the War Revenue Law of 1898, upon which the said indictment was based, were unconstitutional and void because

they were in violation of the Constitution of the United States, and, more particularly, in violation of Article 1, Section 2, Subdivision 3, thereof, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers"; and of Article 1, Section 9, Subdivision 4, thereof, which provides that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken". His demurrer was overruled and he was granted leave to plead over. On the 12th of March, 1902, he pleaded not guilty. A trial was thereupon had before the Honorable EDWARD B. THOMAS, Judge, and a jury, and the plaintiff in error was adjudged guilty as charged in said indictment and sentenced to pay a fine of five hundred dollars and to be committed to jail until the sum should be paid or until he should be otherwise discharged by law. He was then paroled in the custody of counsel, and later gave his own recognizance for one thousand dollars. He then petitioned for a writ of error from the Supreme Court of the United States of America to the said Circuit Court of the United States for the Southern District of New York. The said writ of error was granted, and a transcript of the record, proceedings and papers in the cause was sent to the Supreme Court of the United States. The cause is now on the calendar for the October Term, 1901, and is numbered 650.

The said George C. Thomas, by his attorney, now moves this Court to advance this cause upon the docket, and to set it down for argument upon such day during the present term as may be convenient to the Court, for the following reasons:

I. The case presented here is a criminal case.

II. The plaintiff in error is a broker doing business in the City of New York. For almost four years last past he has been, and is paying to the Government large sums of money in taxes which he believes to be laid and collected under a law which is in violation of the Constitution of the United States. This law may be repealed in the near future, but even if it is repealed the plaintiff in error wishes to bring actions to recover back by due process of law the taxes heretofore paid by him, in the event of this court sustaining his contention that the portion of the War Revenue Law in question is unconstitutional. Many other brokers and other individuals

who are engaged in the business of buying and selling stock are interested in like manner in the early disposition of the case.

III. The case presented here raises questions of importance to the Government of the United States involving the constitutionality of certain portions of the Act of Congress entitled "An Act to provide ways and means to meet war expenditures, and for other purposes", approved June 13, 1898, and known as the War Revenue Law of 1898

Notice of this motion has been served on the Attorney-General and proof thereof filed with the Clerk of this Court.

Dated May 2nd, 1902.

FRANK D. PAVEY,
Counsel for George C. Thomas.

Supreme Court of the United States.

No. 43.—October Term, 1903.

George C. Thomas, Plaintiff in Error, vs. The United States. } In error to the Circuit Court of the United States for the Southern District of New York.

[February 23, 1904.]

George C. Thomas was indicted for violation of the internal revenue laws of the United States in that, being a broker in the city of New York, he sold certain shares of Atchison preferred stock and omitted the required revenue stamps from the memorandum of sale. He demurred to the indictment on the ground that the act of June 13, 1898, 30 Stat. 448, c. 448, which required the stamps to be affixed, was unconstitutional. The demurrer was overruled, the court, Thomas, J., delivering an opinion. 115 Fed. Rep. 207.

Trial was had, defendant found guilty, and judgment rendered, sentencing him to pay a fine of five hundred dollars.

The case was then brought here on writ of error.

Mr. Chief Justice Fuller delivered the opinion of the Court:

By the first clause of section eight of article I of the Constitution, Congress is empowered "to lay and collect taxes, duties, imposts and excises," "but all duties, imposts and excises shall be uniform throughout the United States."

This division of taxation into two classes is recognized throughout the Constitution.

By clause three of section two, representatives and direct taxes are required to be apportioned according to the enumeration prescribed, and by clause four of section nine, no capitation or other direct tax can be laid except according to that enumeration.

By clause one of section nine, the migration or importation of persons by the States was not to be prohibited prior to 1808, but a tax or duty could be imposed on such importation, not exceeding ten dollars for each person.

By clause five it is provided: "No tax or duty shall be laid on articles exported from any State."

By clause two of section ten, no State can, "without the consent of the Congress, lay any imposts or duties on imports or exports, except what may

be absolutely necessary for executing its inspection laws." By clause three the States are forbidden, without the consent of Congress, to "lay any duty of tonnage."

And these two classes, taxes so called, and "duties, imposts and excises," apparently embrace all forms of taxation contemplated by the Constitution. As was observed in *Pollock* v. *Farmers' Loan and Trust Company*, 157 U. S. 429, 557: "Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

The present case involves a stamp tax on a memorandum or contract of sale of a certificate of stock, which plaintiff in error claims was unlawfully exacted because not falling within the class of duties, imposts and excises, and being, on the contrary, a direct tax on property.

There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like.

Taxes of this sort have been repeatedly sustained by this court, and distinguished from direct taxes under the Constitution. As in *Hylton* v. *United States*, 3 Dallas, 171, on the use of carriages; in *Nicol* v. *Ames*, 173 U. S. 509, on sales at exchanges or boards of trade; in *Knowlton* v. *Moore*, 178 U. S. 41, on the transmission of property from the dead to the living; in *Treat* v. *White*, 181 U. S. 264, on agreements to sell shares of stock denominated "calls" by New York stock brokers; in *Patton* v. *Brady*, 184 U. S. 608, on tobacco manufactured for consumption.

Brown v. *Maryland*, 12 Wheat. 419, and *Fairbanks* v. *United States*, 181 U. S. 283, are not in point. In the one the clause of the Constitution was considered which forbids any State, without the consent of Congress, to "lay any imposts or duties on imports or exports," and in the other, that "no tax or duty shall be laid on articles exported from any State." The distinction between direct and indirect taxes was not involved in either case.

The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation.

Judgment affirmed.